

U.S.C.A. 3070  
No. 15962 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, Appellant,

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KIT-  
OFF and NICK KABAK, a partnership doing  
business under the firm name and style of  
North Star Mining Company, Appellees.

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Transcript of Record

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Appeal from the District Court for the Territory of  
Alaska, Fourth Judicial Division

FILED  
JUL 15 1958  
PAUL P. O'BRIEN, CLERK



No. 15962

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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,  
Fourth Division

No. 5395

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership  
doing business under the firm name and style  
of NORTH STAR MINING COMPANY,  
Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of MIKE STEPOVICH, Deceased,  
Defendant.

## SECOND AMENDED COMPLAINT

Comes now the above-named Plaintiffs and for  
cause of action against the Defendant above-named  
allege as follows:

### I.

That on the 13th day of February, 1942, James  
Zukoev, Nick Kupoff and Paul Drazenovich were  
co-partners doing business under the firm name and  
style of North Star Mining Company in the Fair-  
banks Recording Precinct, Fourth Division, Ter-  
ritory of Alaska. That on or about the 6th day of  
August, 1942, the said Paul Drazenovich, with the  
consent of the Lessor, Mike Stepovich, conveyed all  
his interest in the said partnership and in the lease-  
hold hereinafter described, to James Zukoev, Nick  
Kupoff, Mike Kitoff and Nick Kabak, and who  
thereafter were co-partners under the same firm and  
name of North Star Mining Company.

## II.

That Mike Stepovich, the Lessor named in the hereinafter described leasehold, died testate on or about the 21st day of September, 1944, at Los Gatos, California, and named Vuka Radovich Stepovich as Executrix of his estate; that upon the said will being proven in the Probate Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct, Letters Testamentary were issued to the said Vuka Radovich Stepovich and she now is the duly appointed, qualified and acting Executrix of the Estate of Mike Stepovich, Deceased.

## III.

That on or about the 13th day of February, 1942, the said decedent did let, lease and demise unto the said Paul Drazenovich, Nick Kupoff and James Zukoev, certain mining ground situate in the Fairbanks Recording Precinct, Third Division, Territory of Alaska, which said mining ground is more fully described in said lease, a copy of which is attached hereto and by reference made a part hereof.

## IV.

That thereupon, pursuant to the terms of said lease, the said partners entered upon the said demised premises and began preliminary dead work preparatory to the commencement of actual mining operations. That they overhauled all machinery, equipment and tools; repaired the buildings on said ground; put the shaft in safe condition for mining and cleaned out the drift from the shaft to that part



of the said mining ground leased to said partners; and upon the completion of said preliminary dead work, diligently prosecuted mining operations contemplated under the terms and conditions of the said lease, and in all respects abided by all the terms, covenants and conditions of the same.

## V.

That the said decedent, notwithstanding the fact that all accounts had been fully settled between him and the Plaintiffs on the eighth day of August, 1942, did, on the 21st day of August, 1942, wrongfully cause to be filed in the District Court for the Territory of Alaska, Fourth Division, an action against said Plaintiffs and did wrongfully and unlawfully cause a writ of attachment to be issued by said Court commanding the United States Marshal for the Territory of Alaska, Fourth Division, to attach all of the property of the said Plaintiffs within the Territory of Alaska not exempt from execution, and in particular the machinery, tools, groceries, wood, dump, sluice boxes and all other property of the Plaintiffs on said mining ground with the exception of blankets and grips of said Plaintiffs, and did unlawfully, wrongfully and maliciously, abuse the process of this Court by directing and instructing the said United States Marshal to seize all of the said property of Plaintiffs and oust and eject the said Plaintiffs from the said demised premises.

## VI.

That on or about the 24th day of August, 1942, pursuant to said writ of attachment and instructions

as aforesaid, the United States Marshal for the Territory of Alaska, Fourth Division ousted and ejected the Plaintiffs from said demised premises, and placed a custodian in charge thereof and Plaintiffs were prevented from reentering said premises and continuing work under said lease.

## VII.

That thereafter on the 24th day of November, 1942, the said decedent, by his attorney entered a voluntary non-suit of said action in this court. That at the time the said non-suit was entered by the Defendant, winter had set in and it was impossible for Plaintiffs to resume mining operations which had been interrupted by the wrongful and malicious acts of the Decedent.

## VIII.

That at the time of the ousting and ejecting of Plaintiffs as aforesaid, Plaintiffs had taken out a large dump of rich gold bearing gravels and had put a large amount of the same through the sluice boxes, but by reason of said ouster and ejectment of Plaintiffs, they were unable to clean the sluice boxes or wash the balance of the dump. Plaintiffs believe and therefore aver, that the said dump and sluice boxes contained twenty thousand (\$20,000.00) Dollars worth of gold, all of which decedent appropriated to his own use and profit. That from the date of the entry of the Plaintiffs on the said demised premises they had expended a large sum or sums, of money in the development and operation of said property. That by reason thereof, the Plain-

tiff up to the time of the ouster and ejectment as aforesaid, suffered a loss of Six Thousand Seven Hundred Ninety-one and 29/100 (\$6,791.29) Dollars, no part of which has been paid to Plaintiffs by decedent or defendant.

### IX.

The Plaintiffs believe and therefore aver that they would have recovered \$150,000.00 in gold from said demised premises during the remainder of the term of said lease, to-wit: between the 24th day of August, 1942, and the 1st day of November, 1943, had they not been so maliciously, unlawfully and wrongfully ousted and ejected from said premises, of which sum one hundred thousand (\$100,000.00) Dollars would have been Plaintiffs' share under the terms of said Lease; that by such malicious, unlawful and wrongful ousting and ejecting of Plaintiffs from said demised premises, they were damaged in the sum of \$100,000.00, no part of which has been paid by the Decedent or Defendant herein, although demand has been made by Plaintiffs for payment of the same.

### X.

That each, every and all the acts and doings of said decedent were malicious and wrongful, were without any just or probable cause and were illegal and oppressive and were done with a wanton and reckless disregard of the rights of these Plaintiffs, and each of them, and with the intent of ousting and ejecting the Plaintiffs from said mining ground and preventing them from mining under said lease, and to damage Plaintiffs thereby.

Wherefore, Plaintiffs pray judgment against Defendant as follows:

First—For the sum of \$106,791.29 as compensatory damages.

Second—For the Plaintiffs costs and disbursements incurred herein.

Third—For such other and further relief as to the Court may seem just and equitable.

/s/ WARREN A. TAYLOR,  
Attorney for the Plaintiffs.

United States of America,  
Territory of Alaska—ss.

Nick Kupoff, being first duly sworn on oath deposes and says: That he is one of the Plaintiffs in the foregoing action; That he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

/s/ NICK KUPOFF.

Subscribed and sworn to before me this 18th day of October, 1947.

[Seal] /s/ WARREN A. TAYLOR,  
Notary Public in and for  
Alaska.

My Commission expires: 8/11/51.

Receipt of copy acknowledged.



## MINING LEASE

This Lease, made and executed this ..... day of February, A. D. 1942, by and between:

Mike Stepovich, of Fairbanks, Alaska, party of the first part, hereinafter referred to as Lessor and Paul Drazenovich, James Zukov, and Nick Kupoff, of the same place, parties of the second part, hereinafter referred to as the Lessees,

### Witnesseth:

That lessor, for and in consideration of the covenants and agreements to be by lessees kept and performed as hereinafter set forth and the rentals by said lessees to be paid to lessor as set forth hereinafter, has leased, and does hereby lease and let, unto the said lessees the following described mining ground situate in the Fairbanks Mining and Recording Precinct, Fourth Division, Territory of Alaska, to-wit:

All that certain portion of the Eastern Star Mining claim that can be worked and mined from the working shafter used by said lessor during the mining season of 1941, said Eastern Star being a 40 acre patented placer mining claim situate on Fish Creek, a tributary of the Little Chena River, in the said Fairbanks Precinct;  
for the term from date hereof until and including the 1st day of November, 1943.

The terms and conditions of this lease are as follows:

1. That the lessees shall, after the execution of

this lease, enter into possession of said mining property, and are to have possession of the buildings, machinery, tools, and mining equipment now situate on said premises, and have the use of same during the term of this lease; provided, however, lessees shall not loan or rent tools or equipment belonging to said lessor, nor suffer anyone not connected or interested in this lease or employed by lessees to occupy any of the buildings so let.

2. That upon entering possession of said premises, a complete inventory is to be taken of all the personal property, machinery, equipment, tools, messhouse paraphernalia, stock of groceries, and the wood and timber now on said premises; and said lessees will be responsible for the return of all the property shown in said inventory, with the exception of groceries, wood, and timbers used, at the expiration or termination of this lease, in as good a condition as received, wear and tear excepted.

3. That lessees may use the wood on said premises by paying to lessor therefor the sum of \$10.00 per cord, and may use the timber and groceries located on said premises by paying for all so used a price to be agreed upon between lessor and lessees; and said lessees shall pay for all such wood, timber, and groceries so used out of the first cleanup on said premises in 1942.

4. That lessees shall have the use of the 22 Caterpillar during the period of this lease at an agreed rental of \$500.00 for said period, said rental to be paid as follows: \$250.00 during the month of July,

1942, and the balance of \$250.00 on or before September 1, 1942.

5. That for the rights and privileges hereby leased, the said lessees shall pay and deliver to said lessor, or his designated agent, thirty-three and one-third per cent ( $33\frac{1}{3}\%$ ) of the gross amount of all gold, gold dust, and other precious metals and minerals derived from each and every cleanup held on said ground.

6. That said lessees shall, within ten days after date hereof, enter upon said premises for the purpose of developing and mining said premises and said lessees shall thereafter during the term of this lease diligently and continuously without interruption, carry on mining operations on said ground as extensively as good mining methods dictate and as is proper by the particular method chosen by lessees for working said ground.

7. That said lessees shall mine said ground in a first class miner-like manner, and put through the sluice boxes all gold bearing gravel that justifies a reasonable profit; and shall do only such panning and rocking as is necessary to keep the run of pay, and shall keep an accurate record of the values recovered from such pannings to be submitted to lessor at each cleanup.

8. That lessees shall clean up only in the presence of the lessor, or his agent, and shall keep securely at their own risk all the gold, gold dust, and other precious metals and minerals extracted

from said ground, and shall, under no circumstances, rearrange or change the sluice boxes between clean-ups without the permission or presence of lessor; and, after sluicing and the water is turned off in the boxes, lessees shall completely cover the riffles in said boxes with gravel so as not to expose to view the values contained in said boxes.

9. That lessor, or his qualified agent, shall be privileged to enter upon said ground at any and all times during the life of this lease for any and all lawful purposes, and to pan said ground to ascertain the value thereof, and to inspect said workings to determine whether or not they are being conducted in accordance with the terms and conditions of this lease, and shall be privileged to be present at every operation in connection with said clean-ups; and said lessees shall notify said lessor, or his agent, of the date of holding each and every clean-up at least twenty-four hours before the time when same shall be held.

10. That lessees shall deposit the said  $33\frac{1}{3}\%$  rental as hereinabove specified, with the said lessor, or his agent, when said mineral products shall have been cleaned and weighed, or, at the option of said lessor, credit the same to his account at the Bank of Fairbanks, at Fairbanks, Alaska, or such other banks as lessor shall designate.

11. That lessees shall pay all expenses of mining on said premises and shall at all times hold lessor harmless by reason of any indebtedness contracted by lessees, and shall keep posted on said ground



during the time of their possession of the above-described premises not less than three non-liability notices, to be furnished by lessor.

12. That lessees shall keep the ditches leading to said leased premises in good repair during the period of this lease.

13. That lessees shall gather up all pipe and hydraulic paraphernalia belonging to lessor located in the vicinity of the said leased premises and pile same when and where directed by said lessor.

14. That this lease shall not be assigned in whole or in part without the written consent of lessor being first had and obtained.

15. That any substantial violation of the terms of this lease shall be authority for lessor to cancel same, provided, however, that he shall notify lessees of said violation, and if same shall not be remedied within ten days from the time of said notice, lessor may then cancel said lease and enter into possession of said premises, using all necessary force so to do.

16. That in the event of a cancellation of this lease or the termination thereof by operation of time, or otherwise, lessees shall surrender possession of said premises, free and clear of all liens and encumbrances of any nature, whatsoever, to said lessor; and all the property listed in said inventory, with the exceptions as hereinabove stated, as well as any and all other equipment or paraphernalia purchased by lessees during the term of this lease, shall be left on said property, and said lessees are

not to remove from said premises anything of value other than their own personal belongings, such as blankets and grips.

17. To abide by the terms and conditions of this lease and fully perform the covenants and agreements therein contained, the parties hereto do hereby bind themselves, and their, and each of their, heirs, executors, administrators, and assigns, firmly by these presents.

In Witness Whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

[Seal]                      MIKE STEPOVICH,

Lessor.

[Seal]                      PAUL DRAZENOVICH.

[Seal]                      JAMES ZUKOV.

[Seal]                      MIKE KUPOFF.

In the presence of:

JUNE BROWN,

AUGUST W. CONRAD.

United States of America,  
Territory of Alaska—ss.

This is to certify that on this, the 13th day of February, A. D., 1942, before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Mike Stepovich, Paul Drazenovich, James Zukov and Nick Kupoff, to me known to be the identical individuals mentioned in and who executed the

within and foregoing lease, and each acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein specified.

Witness my hand and Notarial Seal the day and year in this certificate first written.

[Seal]

JUNE BROWN,

Notary Public in and for the  
Territory of Alaska.

My Commission expires November 23, 1943.

[Endorsed]: Filed October 20, 1947.

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[Title of District Court and Cause.]

### AMENDED ANSWER

Comes Now the Defendant above named and for answer to Plaintiffs' Second Amended Complaint on file herein admits, denies and alleges as follows:

#### I.

Defendant admits that on the 13th day of February 1942, James Zukoev, Nick Kupoff and Paul Drazenovich were co-partners, doing business under the firm name and style of North Star Mining Company in the Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska.

Defendant denies each and every other allegation contained in paragraph one of the Second Amended Complaint of Plaintiffs, except as hereinabove specifically admitted.

#### II.

Defendant admits the allegations contained in

Paragraph two of said Second Amended Complaint of Plaintiffs.

### III.

Defendant admits the allegations contained in Paragraph three of said Second Amended Complaint of Plaintiffs.

### IV.

As to the allegations contained in Paragraph IV of Plaintiffs' Second Amended Complaint the defendant does not have sufficient information or knowledge upon which to form a belief and therefore denies the same, and the whole thereof.

### V.

As to the allegations contained in Paragraph V of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

### VI.

As to the allegations contained in Paragraph VI of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

### VII.

Defendant admits that on the 24th day of November, 1942, said decedent by his attorney entered a voluntary non-suit of said action in said court. Defendant denies all other allegations contained in Paragraph VII of said Second Amended Complaint for the reason Defendant does not have suffi-



cient knowledge or information upon which to form a belief and therefore denies the same.

### VIII.

As to the allegations contained in Paragraph VIII of said Second Amended Complaint the Defendant does not have sufficient knowledge or information upon which to form a belief and therefore denies the same, and the whole thereof.

### IX.

Defendant denies each and every allegation contained in Paragraph IX of said Second Amended Complaint, and the whole thereof.

### X.

Defendant denies each and every allegation contained in Paragraph X of said Second Amended Complaint, and the whole thereof.

And, for a First, Further, Separate and Affirmative Defense to Said Second Amended Complaint, Defendant Alleges:

That no claim as required by law has been filed with said Defendant, as Executrix of the Estate of Mike Stepovich, Deceased, for any of the alleged act or acts complained of by Plaintiffs in their Second Amended Complaint.

And, for a Second, Further, Separate and Affirmative Defense to Said Second Amended Complaint, Defendant Alleges:

That the above-entitled action was filed in the above-entitled court on the 15th day of October, 1945, and the acts complained of in said Plaintiffs' Second Amended Complaint were alleged to have

been made on and between the 21st day of August, 1942 and the 24th day of August, 1942; and, therefore, this action was not commenced within the time prescribed under the laws of the Territory of Alaska as particularly set forth in Section 3358 of the compiled laws of Alaska, 1933, more than two years having expired from the time of the acts complained of and the filing of said complaint herein.

Wherefore, Defendant as Executrix of the estate of Mike Stepovich, Deceased, demands judgment against plaintiffs for her costs and disbursements herein together with a reasonable attorneys fee to be allowed by the court and that plaintiffs recover nothing from defendant by their action.

E. B. COLLINS and  
JULIEN A. HURLEY,  
/s/ By JULIEN A. HURLEY,  
Attorneys for Defendant.

United States of America,  
Territory of Alaska—ss.

I, E. B. Collins, being first duly sworn, on oath depose and say:

That I am one of the attorneys for the Defendant in the above-entitled action. That the Defendant is not present in the Territory of Alaska and therefore cannot make this verification. That I am familiar with all facts contained in the Second Amended Complaint on file herein and in this action. That I have read the within and foregoing Amended An-

swer, know the contents thereof, and the same is true, as I verily believe.

/s/ E. B. COLLINS.

Subscribed and sworn to before me this 5th day of May, 1948.

[Seal]      /s/ MYRTLE L. BOWERS,  
Notary Public in and for  
Alaska.

My commission expires: 6/10/50.

Service of copy acknowledged.

[Endorsed]: Filed May 5, 1948.

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[Title of District Court and Cause.]

## REPLY

Come now the plaintiffs herein and in reply to defendant's amended answer allege as follows:      .

### I.

In reply to defendant's first further, separate and affirmative defense, plaintiffs deny each and every material allegation contained therein.

### II.

In reply to defendant's second further, separate and affirmative defense, plaintiffs deny each and every material allegation therein contained.

Wherefore, plaintiffs pray for the relief as set forth in their amended complaint.

/s/ WARREN A. TAYLOR,  
Attorney for Plaintiffs.

United States of America,  
Territory of Alaska—ss.

Nick Kupoff, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the foregoing action; that he has read the foregoing Reply and knows the contents thereof, and that the same is true as he verily believes.

/s/ NICK KUPOFF.

Subscribed and sworn to before me this 10th day of June, 1948.

[Seal] /s/ WARREN A. TAYLOR,

Notary Public for Alaska.

My Commission expires 8/11/51.

Service of the foregoing acknowledged.

[Endorsed]: Filed June 9, 1948.

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[Title of District Court and Cause.]

## INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you.

It is in your exclusive province to determine the facts in this case, and to judge the effect and value of the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law



stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Your power of judging the evidence is not an arbitrary one but is to be exercised with legal discretion and in subordination to the rules of evidence.

The action in this case is for damages for breach by the lessor of an implied covenant of quiet enjoyment.

As used in these instructions, the term "Lessees" has reference to the plaintiffs, Nick Kupoff, James Zukoev, Mike Kitoff and Nick Kabak, a partnership doing business under the name of North Star Mining Company. The term "Lessor", as used in these instructions, has reference to the defendant's testator, the deceased, Mike Stepovich.

It is undisputed that the plaintiffs had entered into a lease of the Eastern Star Placer Mining Claim, situated in the Fairbanks Mining and Recording Precinct, Fourth Division, Territory of Alaska, and owned by defendant's testator, Mike Stepovich, which lease has been admitted in evidence as plaintiffs' exhibit No. "A". The lease was executed by the plaintiffs and Mike Stepovich on the 13th day of February, 1942, and was by its terms to extend for a term ending November 1, 1943. Under the terms of the lease, the plaintiffs as lessees were to have the possession and use of the buildings, machinery, tools and equipment then situated on the Eastern Star Claim. The lessees were given the right to work and mine the Eastern

Star Claim insofar as it could be worked and mined through an existing shaft on the claim. The lessees were required to pay to the lessor, Mike Stepovich, as rental or royalty for their lease one-third of the gross amount of all gold and gold dust derived from each and every cleanup held on the Eastern Star Claim.

Plaintiffs in their complaint claim that from the time of the execution of the lease up to and including the 24th day of August, 1942, plaintiffs had commenced and were prosecuting the mining operations contemplated under the terms and condition of the lease, and that throughout this period they had complied with all the terms, covenants and conditions of the lease on their part to be performed.

Plaintiffs claim that on the 21st day of August, 1942, Mike Stepovich, defendant's testator, wrongfully caused to be filed in this Court an action against the plaintiffs, and that at approximately the same time, Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued by this Court commanding the United States Marshal to attach all of the property of the plaintiffs found within the Territory of Alaska, and not exempt from execution, in particular the machinery, tools, groceries, wood, dump, sluice boxes and all other property of the plaintiffs located at the Eastern Star Claim.

Plaintiffs claim at the time of the issuance of the attachment, Mike Stepovich also directed and instructed the United States Marshal to oust and

eject the plaintiffs from the Eastern Star Claim.

Plaintiffs claim that on the 24th day of August, 1942, pursuant to the writ of attachment and the alleged instructions from Mike Stepovich, the United States Marshal ousted the plaintiffs from the Eastern Star Claim, placed a custodian in charge of the claim, and as a result of the Marshal's actions, the plaintiffs were prevented from reentering the Eastern Star Claim and continuing their mining operations on the leased premises.

Plaintiffs claim that thereafter on the 24th day of November, 1942, Mike Stepovich, by his attorney, entered a voluntary nonsuit of the action which he instituted against the plaintiffs on August 21, 1942. That at the time this nonsuit was entered, it was impossible for the plaintiffs to resume their mining operations at the Eastern Star Claim due to the prevailing winter weather conditions.

Plaintiffs claim that by reason of Mike Stepovich's institution of the suit against the plaintiffs, his obtaining the issuance of an attachment against plaintiffs, his instructing the U. S. Marshal to oust and eject plaintiffs from the claim, the U. S. Marshal's subsequent attachment of plaintiffs' properties and ejectment and ouster of the plaintiffs from the claim, the plaintiffs were damaged in the amount of \$6,791.29, for monies expended in the development and operation of the mine up to the time of their eviction on August 24, 1942 and that the plaintiffs were further damaged in the amount of \$100,000.00 for loss of profits from their mining operations on the Eastern Star Claim

for the period August 24, 1942 to November 1, 1943, the remainder of the term of their lease.

Defendant, as Executrix of the estate of Mike Stepovich, in her Answer denies that the plaintiffs had complied with all the terms, covenants and conditions of the lease from its inception up to and including the 24th day of August, 1942.

Defendant denies that Mike Stepovich wrongfully caused to be filed on August 21, 1942 in this Court an action against the plaintiffs and denies that Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued by this Court to attach the plaintiffs' property located in the Eastern Star Claim. Defendant further denies that Mike Stepovich directed and instructed the United States Marshal to oust and eject the plaintiffs from the Eastern Star Claim.

Defendant denies that plaintiffs' property was attached pursuant to the writ of attachment and further denies plaintiffs alleged ouster and ejection from the Eastern Star Claim by the United States Marshal acting pursuant to the writ of attachment and upon alleged instructions from Mike Stepovich and also denies the alleged subsequent prevention of plaintiffs from reentering the Eastern Star Claim and continuing their mining operations.

Defendant denies that the plaintiffs were damaged in the amount of \$6,791.29 for monies expended in the development and operation of the mine up to the time of their alleged wrongful ouster and ejection at the instruction or direction of Mike Stepovich.



Defendant further denies that the plaintiffs were damaged in the amount of \$100,000.00 for loss of profits from their mining operations on the Eastern Star Claim for the period August 24, 1942 to November 1, 1943, the remainder of the term of the lease, as a result of their alleged wrongful ouster and ejection at the instruction or direction of Mike Stepovich.

By her Answer, the defendant has admitted that on February 13, 1942, plaintiffs, as lessees, and Mike Stepovich, as lessor, entered into a lease of the Eastern Star Placer Mining Claim. Defendant has also admitted by her Answer that on November 24, 1942, Mike Stepovich, by his attorney, entered a voluntary nonsuit of the action he instituted against the plaintiffs on August 21, 1942.

You are instructed that the law implies a covenant of quiet enjoyment in the lease of the Eastern Star Placer Mining Claim entered into between the plaintiffs and Mike Stepovich.

As used in these instructions, the term covenant of quiet enjoyment means that the lessor, Mike Stepovich, agreed that the lessees, the plaintiffs, shall have the quiet, peaceable possession, and enjoyment of the leased premises in their prosecution of the mining operations contemplated by the terms of the lease so far as regards any act or acts of the lessor or persons acting under his direction or authority.

The burden of proof is upon the plaintiffs to prove that the lessor, Mike Stepovich, breached this covenant of quiet enjoyment of the lease. The

plaintiffs, to show a breach of this covenant, must prove that the lessor, Mike Stepovich, by unjustified conduct or unjustified legal proceeding taken under his authority and with the intent to deprive plaintiffs of their beneficial enjoyment of the Eastern Star Placer Mining Claim, or with the intent to materially obstruct or interfere with plaintiffs' beneficial enjoyment, actually or constructively evicted the plaintiffs from the Eastern Star Placer Mining Claim.

In a civil action, proof sufficient to establish any fact by any party to the satisfaction of the jury must be by a preponderance of the evidence. A preponderance of the evidence means that which has the greater weight, or carries with it the most convincing force.

You are instructed that if you find under the instructions I have previously given you that the lessor, Mike Stepovich, breached the covenant of quiet enjoyment which the law implies in this lease, then the plaintiffs are entitled to recover such profits, if any, as have been shown by a preponderance of the evidence, that they would have made under the lease were it not for the breach of the covenant of quiet enjoyment by the lessor, Mike Stepovich.

The plaintiffs are not entitled to recover for loss of profits unless you can determine with reasonable certainty the quantity of gold which was and would have been mined by the plaintiffs from the Eastern Star Mine over the term of this lease. Once you have determined the total value of the

quantity of gold which was and would have been mined by the plaintiffs over the term of this lease, you must then deduct therefrom all rentals or royalties which under the lease were required to be paid to Mike Stepovich in the amount of one-third of the value of all gold which was and would have been mined over the term of the lease, you must also deduct from this value the costs of mining the gold which was and would be mined over the term of the lease, which costs include all the expenses of the operation of the mine and including as an element of such costs, the development and operational costs incurred by plaintiffs up to the time of their eviction.

The amount of damages alleged in the complaint to have been suffered by the plaintiffs is \$100,000.00 for loss of profits.

You are instructed that this allegation of damages is merely a claim, it is not evidence, and this allegation must not be considered by you as evidence in the event you should undertake to determine the amount of plaintiffs' damages.

You are further instructed that the plaintiffs' claim in the amount of \$6,791.29 for expenses in the development and operation of the mine up to the time of their alleged eviction is not as a matter of law recoverable against the defendant. These expenses are to be considered by you only as an element of costs in determining plaintiffs loss of profits as I have heretofore instructed you.

You are not permitted to award plaintiffs speculative damages, by which term is meant such antici-

pated losses of profits which, although possible, are remote, conjectural or speculative.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony. In judging the testimony of a defendant, you may consider his interest in the outcome of this matter, his hopes and his fears, and what he has to gain or lose as a result of your verdict. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial, or by proof that he has been convicted of a crime.

A witness wilfully false in one material part of his or her testimony may be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence,



but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience

has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences you may reasonably draw therefrom, and in accordance with the law as I state it to you.

If during this trial I have said or done anything which has suggested to you that I favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not worthy of belief; what facts are, or are not established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when you are convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the purpose of returning a verdict solely because of the opinion of the other jurors.

Upon retiring to your jury room, you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits and forms of verdict. If you find in favor of the plaintiffs and against the defendant, you will use Verdict No. I and insert therein the amount of damages which you find the plaintiffs are entitled to recover. If you find in favor of the defendant and against the plaintiffs, you will use Verdict No. II.

Given at Fairbanks, Alaska, this 17th day of October, 1957.

/s/ VERNON D. FORBES,  
District Judge.

[Title of District Court and Cause.]

VERDICT No. II

We, the Jury duly impaneled and sworn to try the above entitled case, find in favor of the defendant and against the plaintiffs.

Dated at Fairbanks, Alaska, this .... day of October, 1957.

.....

Foreman.

[Endorsed]: Filed October 17, 1957.

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[Title of District Court and Cause.]

DEFENDANT'S REQUESTED  
INSTRUCTION: #1

The value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, is not to be included in any award of damages you might make.

Refused.

/s/ VERNON D. FORBES,  
Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 17, 1957.



In The District Court for the District of  
Alaska, Fourth Judicial Division

No. 5395

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership,  
doing business under the firm name and style  
of NORTH STAR MINING COMPANY,  
Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, deceased,  
Defendant.

### JUDGMENT

This Matter came on regularly for trial on the 14th, 15th, 16th and 17th days of October, 1957, before a jury duly empanelled to try said cause, the Plaintiffs appearing in person and represented by their attorneys, Warren A. Taylor and Warren Wm. Taylor, and the Defendant being personally present and represented by her attorney, Charles E. Cole; and the witnesses on behalf of the Plaintiffs and Defendant were sworn and examined.

After hearing the evidence, the argument and instructions of law by the Court, the jury retired to consider of their verdict and did thereafter return into Court their verdict as follows:



“In The District Court for the District of  
Alaska, Fourth Judicial Division”

No. 5395

Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company, Plaintiffs, vs. Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, deceased, Defendant.

VERDICT No. 1

We, the Jury duly impaneled and sworn to try the above entitled case, find in favor of the Plaintiffs and against the Defendant, and assess the damages, which we find that Plaintiffs are entitled to recover, in the sum of \$26,802.12.

Dated at Fairbanks, Alaska, this 17th day of October, 1957.

/s/ RUSSELL H. PUTMAN,  
Foreman.

Therefore, it is considered and adjudged by the Court that the Plaintiffs, Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company, do have and recover of and from the Defendant, Vuka Radovich Stepovich, Executrix of the estate of Mike Stepovich, deceased, the sum of \$26,802.12, together with interest thereon at the rate of six (6%) per cent per annum from the 7th day of March, 1958; and

the further sum of \$900.00 as and for Plaintiffs' attorney fees in this cause, together with costs in the sum of \$93.04, to be taxed by the Court.

Let Execution Issue According to Law.

Dated at Fairbanks, Alaska, this 7th day of March, 1958.

/s/ VERNON D. FORBES,  
U. S. District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 10, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, deceased, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of March, 1958.

Dated: March 19, 1958.

/s/ CHARLES E. COLE,  
Attorney for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 20, 1958.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings had in this cause that are listed on the Designation of Record of the defendant and appellant herein, viz:

1—Judgment filed March 10, 1958. Pages 1 to 2.

2—Notice of Appeal filed March 20, 1958. Page 3.

3—Instructions to the Jury. Pages 4 to 23.

4—Designation of Record. Pages 24 to 25.

Transcript of Testimony at Trial, separately bound. Pages 1 to 404.

Witness my hand and the seal of the above-entitled Court this 5th day of April, 1958.

[Seal]

JOHN B. HALL,  
Clerk of Court.

In the District Court for the District of Alaska,  
Fourth Judicial District

No. 5395 Civil

NICK KUPOFF, JAMES ZUKOEV, MIKE  
KITOFF, NICK KABAK, a partnership,  
doing business under the firm name and style  
of NORTH STAR MINING, Plaintiffs,

vs.

VUKA RADOVICH STEPOVICH, Executrix of  
the estate of Mike Stepovich, deceased,  
Defendant.

### TRANSCRIPT OF PROCEEDINGS

Appearances: Warren A. Taylor, Esq., and William Taylor, Esq., of Fairbanks, Alaska, attorneys for plaintiffs. Charles E. Cole, Esq., of Fairbanks, Alaska, attorney for defendant.

Before: Hon. Vernon D. Forbes, District Judge, and a Jury.

Date: October 14, 1957.

Place: Fairbanks, Alaska. [1]\*

Be It Remembered, that upon the 14th, 15th, 16th, and 17th days of October, 1957, the above-entitled cause came on regularly for trial, the plaintiffs Nick Kupoff and James Zukoev appearing in person and by their attorney of record above named; the defendant appearing by her attorney of

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\* Page numbers appearing at top of page of Reporter's Transcript of Record.

record above named; the Honorable Vernon D. Forbes, District Judge, presiding.

The Court: In Civil Cause 5395, Kupoff v. Stepovich, are the parties and counsel ready to proceed?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant is ready, your Honor.

The Court: Very well. The Clerk at this time will please call the names of twelve jurors for the box.

Thereupon, a jury was duly called, examined, and sworn to try the issues in the above-entitled cause; the attorneys made their opening statements to the Court and the Jury; and the following proceedings were had.

The Court: Members of the jury, while you have not yet heard any evidence in connection with lawsuit, you have been sworn to try the case, and I admonish you not to discuss the subject matter of this trial with anyone nor among yourselves. This case will be recessed until two o'clock.

(Thereupon a recess was taken from 12:00 noon until 2:00 p.m.)

Clerk of Court: Court is reconvened.

The Court: Will the Clerk please call the roll of the jury.

Clerk of Court: (After calling roll) They are all present.

The Court: Are you ready to proceed, Mr. Taylor? [4]

Mr. Taylor: If the Court please, I would like to call Mr. Kupoff as our first witness.



NICK KUPOFF

one of the plaintiffs, took the stand as a witness in his own behalf, and after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state your name, please?      A. Nick Kupoff.

Q. And where do you reside, Mr. Kupoff?

A. I live up here.

Q. How long have you lived in or around Fairbanks?      A. Oh, fifteen years.

Q. How long?      A. Fifteen.

Q. Fifty years?      A. Fifteen.

Q. Fifteen, and where did you reside before you came to Fairbanks?

A. Well, I was down in Juneau and different places on trips.

Q. How long have you been in Alaska?

A. Since 1916, on and off.

Q. What has been your occupation while you have been in Alaska, Mr. Kupoff?

A. Well, I have been mining, all the way through. [5]

Q. What type of mining?

A. Both. I work for people on quartz mines and work for people on placer mines, and in late years I worked for myself most of the time.

Q. When did you first mine in the Fairbanks district?

A. 1936, that is, I worked for somebody in placer mines.

Q. And where were you working at that time?

(Testimony of Nick Kupoff.)

A. Sourdough Creek, they call it, for Zimmerman.

Q. And do you know Mr. Zukoev?

A. Yes.

Q. How long have you known him?

A. Oh, I have known him since we was kids back in——

Q. Since what?           A. Since we was kids.

Q. You knew him in the old country?

A. Yes.

Q. And you have known him for quite a while in Alaska, then?

A. Oh, yes, when I come to Fairbanks in '36.

Q. And were you ever associated with Mr. Jimmy Zukoev in any mining venture?

A. Yes, on Fish Creek.

Q. And what was the name of the claim, if it had any?           A. Eastern Star.

Q. And who did that claim belong to?

A. Mike Stepovich. [6]

Q. You say you and Mr. Zukoev mined on that particular claim?           A. Yes.

Q. And what authority did you have to mine on there?           A. Well, we had the lease.

Q. Was it just you and Jimmy Zukoev on that lease?

A. No, there was a man, Paul Drazenovich, who was third party.

A. So were all three of you on the lease as lessees?           A. Yes, sir.

(Testimony of Nick Kupoff.)

Q. And Mr. Stepovich was the lessor, is that right?      A. Yes, sir.

Mr. Taylor: If the Court please, this has already an identification 1 and Exhibit A mark on it. I suppose this should be crossed out and re-identified.

The Court: That is correct.

Mr. Taylor: Unless Mr. Cole would want to stipulate that that is——

The Court: You might show it to Mr. Cole after it has been identified.

Mr. Taylor: Yes, sir.

Clerk of Court: Plaintiffs' Identification No. 1.

(Lease between plaintiffs and Mike Stepovich was marked Plaintiffs' Identification No. 1.) [7]

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 1 and ask you to examine that instrument, together with the signatures, and after you have examined that, state, if you can, what that purports to be.

Mr. Cole: Your Honor, I object to the question, to state what it purports to be. That is entirely irrelevant. It is only a question of what it is.

The Court: I think that is technically correct. After examining it, he can state what it is.

Mr. Taylor: If he knows.

A. This is the lease between Mike Stepovich and the three men, lessees.

Q. (By Mr. Taylor): Between you, Jimmy, and Paul?      A. Yes, and Mike Stepovich.

Mr. Taylor: If the Court please, we would now

(Testimony of Nick Kupoff.)

like to have that introduced in evidence as Plaintiffs' Exhibit A.

Mr. Cole: The defendant has no objection to its admission in to evidence, your Honor.

The Court: Very well, it will be received.

(The lease, previously marked Plaintiffs' Identification, was received in evidence as Plaintiffs' Exhibit A.)

Mr. Taylor: If the Court please, to save time now, I will reserve the reading of this lease to the jury at the present time. [8]

The Court: You mean that you may want to read it aloud to the jury?

Mr. Taylor: Yes, parts of it, yes, your Honor.

The Court: It is admitted in evidence, and the jury may see it.

Mr. Taylor: Probably you would like to take a look at the signatures at the bottom of the instrument (handing exhibit to the jury). You can just pass it along. The jury will have that in the jury room.

The Court: Yes, indeed, unless it should be subsequently stricken.

Mr. Taylor: Yes, your Honor.

Q. (By Mr. Taylor): Mr. Kupoff, what type of mining ground was the claim mentioned in the lease?

A. Well, it was what we call underground mine, placer gold.

Q. How did you get the gravel and its gold contents from underground?



(Testimony of Nick Kupoff.)

A. Well, they got to sink a shaft, in other words, a hole down to bed rock, and dig out the gravel with the gold contents and hoist it up with a hoist, dump it into the boxes and sluice it with water.

Q. After this lease was executed, I believe the 13th day of February, 1942, what did you and Mr. Zukoev and Mr. Drazenovich [9] do, then, towards carrying out the terms of this lease?

A. We went out the 22nd of February.

Q. And what preparations, if any, did you make before you went out to Fish Creek?

A. We arranged for supplies and bought groceries, we bought rails, what we thought we would use.

Q. What kind of rails? A. Car rails.

Q. Yes.

A. And groceries that we bought and we went out and stayed overnight, walked down with snow shoes and stayed overnight and got a cat to plow the road and when the supplies came out, hauled them down and started working.

Q. How did you go out to the Eastern Star Claim on Fish Creek from Fairbanks?

A. We walked in.

Q. From Fairbanks?

A. Yes, we walked out, the mouth of Fairbanks Creek.

Q. And how far did you walk in to the Eastern Star claim? A. About three miles.

Q. About three miles?

A. Or four miles, I didn't measure.



(Testimony of Nick Kupoff.)

Q. Did just you and Mr. Drazenovich and Mr. Zukoev go there at that time? A. Yes. [10]

Q. Did you later have some employees?

A. Well, I don't know how many days it was between, but as soon as we set up the camp we had a couple men went out there.

Q. You say that you had to walk in that three miles. Why was it you had to walk?

A. Well, there wasn't no transportation, a car couldn't go through there.

Q. Why couldn't the cars go there?

A. There was no road for it.

Q. There was no road to the Eastern Star Mine?

A. No, not nothing but cats. A cat could go over, but no cars.

Q. And snow plows?

A. Yes, we plowed the snow with a cat tractor.

Q. You said you went in there and got a cat. Whose cat did you use?

A. Well, one we had on the lease.

Q. How much snow was there on the ground at that time, Nick?

A. I should judge three feet or so.

Q. And after you got there, what in the way of buildings and equipment was there on the ground?

A. Well, there was tool sheds, but there was old log house, there was another house there and we evened it up.

Q. Did you have a cook house?

A. Yes, one old log house supposed to be a cook house, yes. [11]

(Testimony of Nick Kupoff.)

Q. And then what machinery, if any, was on the property?

A. Well, there was steam boilers, two boilers, and a hoist and cables.

Q. Cables?

A. Cables was necessary for the hoist and get it out of the mine.

Q. And these steam boilers, what did they use for fuel? A. Wood.

Q. Wood, and what were these steam boilers used for, Nick?

A. Thaw the ground underground and drive what they call the points into ground and give them the steam and thaw the dirt so you can pick, and the other part was hoisting the dirt out of the holes, they use steam power for that.

Q. A steam hoist? A. Yes.

Q. And then part of the steam was for thawing the ice? A. The ice and gravel.

Q. And frozen ground? A. Yes.

Q. Was the ground underneath, below, down in the drift, was that all frozen?

A. Yes, it was frozen solid.

Q. You say—first, where was this hoist located that you had there?

A. Well, it was located, I would say, 30 feet from the [12] shaft.

Q. Thirty feet from the shaft? A. Yes.

Q. And what was the dimensions of this shaft, how wide and how long was it?

A. Eight by eight.

(Testimony of Nick Kupoff.)

Q. And how deep was it to the bottom of that shaft?

A. I didn't measure it, but I heard it was 75 feet and when I come, why, I think it was 93.

Q. Ninety-three feet. Would that be on bed rock, then?

A. Yes, it would be a little bit below the bed rock, even.

Q. When you arrived at the claims, what was the condition of that shaft, Nick?

A. Almost full of ice and sloughings.

Q. What?

A. Sloughings, dirt and stuff in the bottom.

Q. And then what did you do in regard to this shaft?

A. Well, we cleaned it, dig ice, and dig the dirt out, so we can get down to the bottom.

Q. Was that shaft timbered? A. Yes.

Q. And at the time that you were cleaning out this shaft, had your hired men come out?

A. Yes, there was two men we hired by that time.

Q. And how long did it take you to sink that shaft—to clean that shaft out? [13]

A. Well, I don't know exactly, but somewhere around 25 days, a month.

Q. And then after you got down to bedrock, what did you find down there?

A. Well, there was the same thing, frozen spots, some places solid.

Q. No, I mean were there any drifts or anything

(Testimony of Nick Kupoff.)

leading from the bottom of this shaft in any other direction?

A. Yes, there was three different drifts, two short shafts, the other one, one way, that was longest.

Q. And the one way, is that the direction that you wanted to go?

A. The one that was longest was the direction that we figured.

Q. And what did you have to do with that drift, Mr. Kupoff?

A. The same as we done in the shaft, clean it, pick ice, pick rocks, timber it wherever it is necessary.

Q. What, if anything, did you do in the drift when you left the shaft, at the bottom of the shaft, and you were in the drift, what condition did you find that drift in that you followed?

A. Well, it was in good shape outside of full of ice and stuff, but then there was timber part-way that was sloughing, you know, rocks dropping, dirt come down. We had to clean the [14] timber to make it safe to go through.

Q. By cleaning it, what do you mean, Nick?

A. Well, take ice out, pick the rocks, pick whatever gravel come down from the ceiling, and if you can't pick it you have to steam it to pick it, and get them out of there, hoist them out, dump them out.

Q. And then how far did you find that that drift extended?



(Testimony of Nick Kupoff.)

A. Well, somewhere around 60 to 80 feet, I don't know the exact number of footage.

Q. And then when you got into that sixty or eighty feet, cleaning that up, what did you then proceed to do?

A. Well, when we hit the face, we started steaming it and going ahead with it.

Q. By "going ahead" what do you mean, Nick? When you steamed it, what did you do?

A. Well, we drive the pipes—I explain all that to the people who don't know what the term is—drive the pipes and connect the steam on it, and leave the steam on slow for hours, then your ground is thawed and you can pick it with pick and shovel.

Q. Then after you picked that ground and got it down, what did you do with it?

A. Then we haul it out in the bucket and hoist them up.

Q. This bucket, what do you mean by that bucket?      A. Well, the hoist bucket.

Q. And how did you haul this debris and the dirt and [15] stuff from where you thawed it to the shaft?

A. We had a car going on the rails.

Q. You had rails, there were iron rails and a car?      A. Iron rails and a car.

Q. Was that just a regular mine car?

A. Yes.

The Court: Mr. Taylor, do you suppose you can



(Testimony of Nick Kupoff.)

explain by the witness what "drift" is. I am wondering if that is just a horizontal tunnel.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Would you just explain to the Court and jury, Nick——

A. Well, a drift is if we go straight on the floor, that is drift. If you go down hill, it is soft.

Q. You sink a shaft and drive a drift; is that right? A. Yes, that's it.

The Court: Very well.

Q. (By Mr. Taylor): So, then, when you went ahead on that drift, you say thawing with steam pipe, do you know, Nick, in what direction you were going?

A. Well, I think it is east, but whether it was east or north, we were supposed to go toward the pay dirt.

Q. And did you deviate in any way from going east or towards the pay dirt? By "deviate" I mean did you change your [16] direction?

A. Yes, we did. Mike come down one day and he wanted to go right. He claimed there was four and a half foot—four and a half dollars a foot ground, that's square foot value supposed to be four and a half, and we went in there about forty feet, and as far as we could see it didn't pay so we keep on going all directions.

Q. Did you find any indications when you drove in the forty feet as to whether it had been prospected at that particular place in any way?

A. A drill hole, that's all that was.

(Testimony of Nick Kupoff.)

Q. So then when you got there to that drill hole and found nothing, what did you do then, Nick?

A. Well, we come back and keep on going our first direction. I say that we going uphill.

Q. Uphill, you say? A. Yes.

Q. Where the bedrock started to slope up?

A. Well, bedrock very little, but the surface was sloping up.

Q. And do you know what depth you were at that time, Nick, when you were at that drill hole where you had deviated from your general direction?

A. Well, it could be 75 or 48, I don't remember the drill hole numbers. [17]

Q. Then, when you abandoned that, you say you went ahead towards where you thought the pay streak was? A. Yes, sir.

Q. And approximately, Nick, how many feet on this drift did you drive towards where you thought the pay streak was?

A. Well, from there on I think it must have been 175 feet, roughly.

Q. And then what were you doing with the dirt and gravel that you were removing when you were running that drift, Nick?

A. Well, we take them up and sluice it, wash it through the sluice boxes.

Q. Now, did you make any clean-ups during that time?

A. Yes, we have some small clean-ups, dirt that we take out while we were driving the drift.

(Testimony of Nick Kupoff.)

Q. Do you know how much those clean-ups were, Nick?

A. I think eleven hundred was one and twelve hundred something, I don't remember exactly the dollars but——

Q. How many were they?

A. Two clean-ups—three.

Q. Three clean-ups?

A. One eleven hundred, one twelve hundred, the other one was eleven hundred something, too.

Q. And you were just running that, were you not—were you just running that dirt through for the fact that if there was [18] anything in it you could recover? A. Yes, sir.

Mr. Cole: Your Honor, that is a leading question. I move the answer be stricken.

The Court: I will permit it to stand.

Mr. Taylor: Now, I believe, for convenience, I am going to call this witness "Nick" and the other one "Jimmy". It is confusing when I use the words Zupoff and Zukoev.

The Court: I see nothing to calling the witness "Nick," if he doesn't object to it.

Q. (By Mr. Taylor): Now did you later, Nick, after you got working in these drifts, did you have any more men employed?

A. Yes, we have three or four men there.

Q. And during all your operations there, could you state how many men that you had?

A. Well, anywhere from two to seven men at different times. I couldn't date them but——

(Testimony of Nick Kupoff.)

Q. Also did the membership in the partnership change any time during the operations, Nick?

A. Yes, they was change.

Q. And in what way?

A. Paul, he have something in his mind and he transfer his right to Jimmy Zukoev and myself.

Q. And by "Paul" do you mean Paul Drazenovich? [19]      A. Paul Drazenovich.

Q. And will you state whether or not any new partners were taken in?

A. Yes, later on we take in two new partners.

Q. And what were their names?

A. Nick Kobak and Mike Kitoff.

Q. And do you know when they entered the partnership?

A. Well, in July sometime. I couldn't date it exactly.

Mr. Taylor: I would like to have that marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 2.

(Assignment of partnership interest to Mike Kitoff was marked Plaintiffs' Identification No. 2.)

Mr. Taylor: And also this one.

Clerk of Court: Plaintiffs' Identification No. 3.

(Assignment of partnership interest to Nick Kobak was marked Plaintiffs' Identification No. 3.)

Q. (By Mr. Taylor): Now, Nick, I will hand you Plaintiffs' Identification No. 2 and ask you to examine that and state, if you can, what it is.



(Testimony of Nick Kupoff.)

A. This is when Mike Kitoff came in as a partner.

Q. When he secured an interest in it?

A. Yes.

Mr. Taylor: If the Court please, we would like to have [20] that Plaintiffs' Identification 2 admitted in evidence as Exhibit B.

Q. (By Mr. Taylor): And I will hand you, Nick, Plaintiffs' Identification 3 and ask you to examine that and——

Mr. Cole: Your Honor, may I have an opportunity to read this before he continues, because it is rather confusing.

Mr. Taylor: I will give you two of them here. Let me get this one in and then you can take a look at both of them.

The Court: You might wait just a minute and let Mr. Cole examine Identification 2 that you handed him a moment ago. Let him examine it.

Mr. Taylor: Mr. Cole has Identification 2.

The Court: Yes, and we will wait until he examines it.

Mr. Cole: I have no objection to its admission, your Honor, except that I can't see the relevancy of it, Mr. Kitoff's being in the partnership. If they are deceased and their estates are parties to this action, but——

The Court: Very well, it will be received.

Clerk of Court: Exhibit B. Identification No. 2 is Plaintiffs' Exhibit B.

(The assignment of partnership interest to



(Testimony of Nick Kupoff.)

Mike Kitoff, previously marked Plaintiffs' Identification 2, was received in evidence as Plaintiffs' Exhibit B.)

Q. (By Mr. Taylor): Now, Nick, you examined Plaintiffs' Identification No. [21] 3. Will you state what that is?

A. That's Nick Kobak's, when he comes in as a partner, the same as Mike.

Mr. Taylor: If the Court please, we would like to offer that in evidence as Plaintiffs' Exhibit C.

The Court: We will give Mr. Cole an opportunity to examine it.

Mr. Taylor: Yes, sir.

Mr. Cole: I have no objection, with the same comment.

The Court: I would like to see it, please.

Mr. Cole: Yes, your Honor.

The Court: It will be received.

Clerk of Court: Exhibit C.

(The assignment of partnership interest to Nick Kobak, previously marked Plaintiffs' Identification 3, was received in evidence as Plaintiffs' Exhibit C.)

Mr. Taylor: I would like at this time to have this marked for identification.

Clerk of Court: Plaintiffs' Identification No. 4.

(Time book for hired help was marked Plaintiffs' Identification No. 4.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I want to hand you Plaintiffs' Identification No. 4. Will you examine that?

(Testimony of Nick Kupoff.)

A. I don't think I need glasses for that. That's my own time book, when I keep the time. [22]

Q. And were the entries in there made by you, Nick?      A. Yes.

Q. That is your time book?      A. Yes.

Mr. Taylor: If the Court please, that is the time book of——

Q. (By Mr. Taylor): Just a moment, is that the time book of all the men?

A. All the men working there.

Q. Including the partners?

A. Yes, it should be all there. I think I have another book for the partners.

Mr. Taylor: If the Court please, we would like to offer this in evidence.

Q. (By Mr. Taylor): I want you to examine this, though, Nick, and see if the partners are entered in there, in that book.

A. No, there's no partners. Just the people we hired.

Q. That's your employees, only?      A. Yes.

Mr. Taylor: If the Court please, I would like to offer that in evidence as Plaintiffs' Exhibit D.

Mr. Cole: We object to this, your Honor, on the grounds that it doesn't appear any more than inferentially that this was a time book made by this witness in this operation.

The Court: If your objection is that there is no proper foundation [23] laid for the introduction—is that it?

Mr. Cole: In substance, I suppose.

(Testimony of Nick Kupoff.)

The Court: I mean, I must sustain that objection, if that is your objection.

Mr. Cole: That is my objection.

The Court: It must require a showing as to who made the entries in the book and when they were made.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Mr. Kupoff, calling your attention to the entries made in this book, purporting to be the pay periods——

Mr. Cole: I object to that, Your Honor, on the grounds that Mr. Taylor can't testify what it purports to be.

Mr. Taylor: I am not trying to testify. I am only asking him a question as to what it purports to be.

Mr. Cole: He never said it purported to be that.

The Court: And, of course, the question is leading and suggestive. Let the witness testify as to the identification.

Q. (By Mr. Taylor): Mr. Kupoff, then, you take a look at this and then you tell me what those entries are, who made them, and when they were made, and what they were in relation to.

A. They were February 22 to 28, that's a week. There is——

Q. Just generally state, Nick, what they are.

A. There is Leo Koppa, cook. [24]

Q. Now, don't read them, Nick. Just what each one of those double pages is.

A. Well, monthly, weekly, each man, how many

(Testimony of Nick Kupoff.)

hours they work. I didn't put it by hours but by day. They worked ten hours, and their name is there, and the date, week they worked, their name is there, all here, if you want me to read it. That's the way I kept them all the way through.

Q. And who made those entries in there, Nick?

A. What do you mean?

Q. Who put the writings down? Who marked the time?

A. All these writings are my writings.

Q. When were they made?

A. Each page has got a date here. They were made in the spring of 1942.

Q. And you say that—were those entries made daily?

A. Yes, every day I marked their time, if that is what you mean "entries."

Q. You say those were employees. What job were they on at that time?

A. Well, they was working in the mine, cleaning or hauling wood in the early part of the spring.

Q. And that is the mine that you have been testifying to, the mine that was owned by Mr. Stepovich?

A. That's right.

Q. So they were all made by you in the course of the business [25] at the time that they occurred; is that right?

A. That's right. They worked and I marked their time every day in the week.

Mr. Taylor: If the Court please, I would like to re-offer it as showing—I think all the objec-



(Testimony of Nick Kupoff.)

tions made by Mr. Cole have been met. They were made in the course of business by the witness and were a daily record.

The Court: Do you have any objection, Mr. Cole?

Mr. Cole: I haven't had an opportunity to inspect it yet, your Honor.

The Court: You may do so now. Just one moment, please.

(Mr. Cole examined the proposed exhibit.)

Mr. Cole: We have no objection.

The Court: Very well, it will be received.

Clerk of Court: Exhibit D.

(The time book for hired help, previously marked Plaintiffs' Identification No. 4, was received in evidence and marked Plaintiffs' Exhibit D.)

Mr. Taylor: I would like to have this marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 5.

Mr. Taylor: Perhaps, your Honor, one of these is a continuation of the other, and I would suggest that we designate that Identification 5-A and 5-B. The other one would be 5-B.

The Court: You have two there?

Mr. Taylor: There are two. One goes up to the middle of [26] July, and then the other is a continuation that takes it up to the 22nd of August.

The Court: I see no objection to marking them 5-A and 5-B.

Mr. Cole: Your Honor,—



(Testimony of Nick Kupoff.)

The Court: Yes.

Mr. Cole: —just this problem, when we transpose these to alphabetical enumerations that we are going to have to shift back into, when we make them “A” and “B”—it seems to me it would be easier to just make them 6 and 7, or 5 and 6.

Mr. Taylor: They are all one thing.

The Court: I don't see any problem either way. There is a possibility, of course, one may be admitted and not the other.

Mr. Taylor: There would be no possibility of that, your Honor.

The Court: I know there is that possibility.

You are asking that these be identified, as I understand your statement, Mr. Taylor, Identification 5-A and Identification 5-B.

Mr. Taylor: Yes.

The Court: They may be so identified. The numerals go to the identification and the alphabet to the exhibit, so I think we will have no difficulty.

Mr. Cole: Then, if they are admitted, they will be E-1 and E-2, is that it?

Mr. Taylor: That is right. [27]

(Time book, week ending Feb. 28, 1942, through week ending July 18, 1942, was marked Plaintiffs' Identification No. 5-A.)

(Time book, week ending July 25, 1942, through week ending August 22, 1942, was marked Plaintiffs' Identification No. 5-B.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I now

(Testimony of Nick Kupoff.)

hand you Plaintiffs' Identification 5-A and have you examine that and ask you to state what it is.

A. This is the—one of my bookkeepers, Ray Kohler and Bolet, they take care of my bookkeeping and that's their writing, their time book.

Q. Then, they broke it down and segregated it as to the social security, and other things?

A. Yes, I would think they go regular procedure and take the tax out and social security and all.

Q. Those books, then, would show the total amount of money paid out for wages?

A. Yes, they are all paid.

Mr. Taylor: If the Court please, would the Court like to look at this and examine it?

The Court: Well, the witness hasn't looked at this yet, has he?

Mr. Taylor: Yes, I think he looked at both of them. They are both the same, your Honor. One just has a couple weeks' entries in it. I will get the other one. [28]

The Court: You might show it to Mr. Cole.

(Mr. Taylor handed the record book to Mr. Cole.)

Mr. Cole: The defendant objects to these, your Honor, on the ground that they are hearsay. It doesn't appear that this witness made those entries in those books; therefore, we don't have any idea as to their veracity or their reliability.

The Court: I don't think there is sufficient showing yet by the witness to enable me to receive them, Mr. Taylor.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Mr. Kupoff, you stated that these were made from the time book that you submitted to Mr. Bolet, of Bolet and Kohler?

A. Yes, sir; that's right.

Q. And that the hours shown upon them were actually the hours that the men worked and would show as reflected from your time book?

A. That's right.

Q. And were the wages shown in these the wages which you were paying the men?

A. That's right.

Q. And was the time worked the same as the time that shows in your time book?

A. Yes, that's right. Bolet copied out of my book every week so that he can keep the books.

Q. And then they would make the distribution for overtime and other things? [29]

A. Oh, yes.

Q. And you saw these every week, did you, Mr. Kupoff?

A. I used to see them not every week but sometimes I had to buy some stuff, and leave my book and she copy, and I come back and get my book and saw how it works.

Q. And you know that these are correct and based upon your time book?

A. That's right, for sure.

The Court: Are you re-offering them now?

Mr. Taylor: Yes, your Honor.

The Court: Mr. Cole?

(Testimony of Nick Kupoff.)

Mr. Cole: The defendant objects to these on the same ground, that we don't know where Bolet is. We actually don't know the records from which he made the entries which appear in this book, and unless that appears, it's nothing but pure hearsay, and we have no idea as to how he performed the calculations other than this witness' testimony that he saw the records, but we don't know what records or books, where they came from, how he did it, how he performed his calculations, and we don't know whether Bolet made these entries or Ray Kohler made the entries, and therefore the defendant objects on the ground that they are hearsay. They haven't been shown to be records made in the ordinary course of business.

The Court: I think it would require a good deal of speculation on my part to know who actually made the entries, whether the [30] person was employed by the partnership or whether they were made during the course of the work. I don't think it is sufficiently spelled out. I feel that under the present state of the record, I must sustain the objection.

Q. (By Mr. Taylor): Mr. Kupoff, were those records in Plaintiffs' Identification 5-A and 5-B made at your direction? A. Yes.

Q. And what was it made from?

A. Well, it was made from my time what I kept, peoples working out there, keep their time, and I told Mrs. Bolet to keep a book, and she get that book and started to weekly figure it up.



(Testimony of Nick Kupoff.)

Q. That was the firm of Bolet and Kohler, was it?  
A. That's right.

Q. And did you check these, did you check this book against your time book when they were given back to you?

A. Well, I never got them. They keep them down at the office.

Mr. Taylor: Your Honor, I feel that the objection of the defendant is not well taken, in view of the fact that this was made at the direction of Mr. Kupoff and it must be in conformity with the time book, and all it was was a segregation showing social security, made at his instructions to his bookkeeper. The original entry in the time book, your Honor, was in this witness' [31] own handwriting.

The Court: Well, I think that the foundation is very weak as to who—just assuming that these persons named were accountants or something or other—I don't recall any testimony as to what services they performed, when it was done, but I feel that at this time, while I doubt that the foundation is very substantial, I am going to admit Identifications 5-A and B.

Clerk of Court: 5-A is Exhibit E-1 and 5-B is Exhibit E-2.

(The two record books previously marked Plaintiffs' Identifications 5-A and 5-B were received in evidence as Plaintiffs' Exhibits E-1 and E-2, respectively.)



(Testimony of Nick Kupoff.)

Mr. Taylor: Maybe this time, your Honor, would be the proper time to take the customary recess.

The Court: Very well. I might state that I wouldn't have admitted Identifications 5-A and 5-B had it not been for the foundation of Exhibit D, which I am sure you will have an opportunity to check.

Mr. Cole: Your Honor, may I make a remark in that connection?

The Court: Yes.

Mr. Cole: I just would like to make two points in connection with it. First, that book, Exhibit D, doesn't show actually the amount of time, just a mark in there. Secondly, it occurs to me that it make no difference whether they were directed to do something or not. That is entirely irrelevant.

The Court: The question is whether they did it.

Mr. Cole: Yes.

The Court: Members of the jury, please heed the admonition I previously gave to you, and before taking the recess, what time do you have, Mr. Taylor?

Mr. Taylor: It is just directly three o'clock according to my time.

The Court: Mr. Hall, what do you have?

Clerk of Court: I have ten after, your Honor.

The Court: I am going to set mine to five past regardless of what time it is now, and let's synchronize our watches.

We will now take a ten-minute recess.

(Testimony of Nick Kupoff.)

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties wish the roll call of the jury?

Mr. Cole: The defendant waives it.

Mr. Taylor: We will stipulate that the jury are all present, your Honor, including the alternate.

The Court: You may proceed.

Q. (By Mr. Taylor): Now, Mr. Kupoff, going back to the start of your partnership, would you state whether or not the three original partners made any contribution to the capital assets?

A. Yes, we did. We put in \$250 apiece to start.

Q. That would be you and Jimmy and Paul?

A. Yes, sir.

Q. Now, did you and your other partners, Mr. Kupoff, have any agreement as to the wages which were allowed the partners?

A. Well, we had agreement that if we make a success we supposed to get ten dollars a day each day we work, this going into the company's account.

Q. What hours did you and your partners work, Mr. Kupoff? Did you keep any record of that?

A. Well, we worked ten hours, every day ten hours.

Q. That was ten hours per day?

A. Ten hours a day.

(Testimony of Nick Kupoff.)

Q. And how many days a week?

A. Seven days a week.

Q. And from the time that you commenced the partnership on February 22, 1942, to the 22nd of August, 1942, how many days did you miss work?

A. Well, it's six months all over, and I don't remember the exact dates, and I never missed a day.

Q. Never missed a day from the time you went up?

A. I was there every day.

Q. According to the time shown on this time book, Nick, how many hours a day—you have checked each day—but how many hours a day did your employees work?

A. They worked ten hours, and if they worked less than ten hours, I would have put the numbers, but I just put one mark [34] as a day.

Q. Then, how were they paid in regard to overtime?

A. Well, after forty hours a week the book-keeper figure out so much for overtime and so much for the regular wage.

Q. And I take it, then, from your answer to that question, that the overtime is broken down upon Plaintiffs' Exhibit E-1 and E-2; is that right?

A. Yes, it is the figure that shows there, is for the men.

Q. Now, Nick, you have kind of given us a description of what you have—what a drift is, a shaft, and other matters pertaining to the mine,

(Testimony of Nick Kupoff.)

but I don't believe that I asked you to describe what a clean-up is.

A. A clean-up is when you put gravel through the box, we call it sluice boxes, and the coarse pieces, we call them riffles. The gravel goes over those riffles, and the gold settles in the riffles. Then we take it up and clean up the gold. That is what clean-up is.

Q. What do you do first before you clean up the gold?

A. We put water in the box and put the gravel.

Q. Do you leave the water run while you are cleaning up?

A. No. No, we slow the water down to almost nothing, when we clean up, and take the riffles up, then we gather the gravel what is left there and take a whiskbroom, we call it, and work it to separate your gold out.

Q. During the summer, then, you say you had three such [35] clean-ups; is that right?

A. Yes.

Q. I believe you testified, Mr. Kupoff, that you bought supplies and material to take out to the place, and I will just ask you if during the summer you did purchase supplies from the merchants in town for your use out there. A. Yes.

Mr. Taylor: These are certain checks, your Honor. I would like to have them marked for identification. Possibly to save time we could designate them as one identification.

The Court: You can try it. Is that 6?



(Testimony of Nick Kupoff.)

Clerk of Court: Yes, sir, that is Identification No. 6. The checks are numbered Plaintiffs' Identification No. 6.

(The envelope with checks was marked Plaintiffs' Identification No. 6.)

Q. (By Mr. Taylor): Now, Nick, I will hand you a number of checks which are marked for identification as Plaintiffs' Identification No. 6, and ask you to examine those papers and state to the jury, if you can, what they are.

A. Well, do you want me to read the names, what they are for?

Q. No, just look them over and then when you get through just state what they are, who drew them, and what they were drawn for, not each particular item, but on whose account.

A. Well, this is canceled checks from the bank with name [36] under the North Star Mining Company. It is my own signature on it, pay to whoever or whatever it was to, supplies or wages or whatever was necessary.

Mr. Taylor: If the Court please, I would like to offer those in evidence as Plaintiffs' Exhibit F.

Mr. Cole: Your Honor, the defendant objects unless it is shown that these checks were expenses and connected with the operation of this mine.

The Court: That is correct, it must be so shown before they are admissible.

Mr. Taylor: I thought he had already testified to that, your Honor. North Star Mining Company, he said that was the——



(Testimony of Nick Kupoff.)

The Court: As I recall, the Eastern Star is the mining company.

Mr. Taylor: The Eastern Star, your Honor, is the name——

The Court: Claim.

Mr. Taylor: ——of the claim. The operating company was the North Star Mining Company that was operating it.

The Court: Where does that appear in the evidence?

Mr. Taylor: It appears in the title of the case, your Honor.

The Court: Well, you can have the witness show, if you are able, for what mining project the checks were issued.

Q. (By Mr. Taylor): At the time that those checks were written, Nick, what [37] or when and where was the North Star Mining Company operating?

A. Well, it was on the Eastern Star Claim on Fish Creek.

Q. Was that the claim that was owned by Mike Stepovich at that time?      A. Yes, sir.

Q. And was that claim the same claim that is the subject matter of this suit?

A. Yes, sir.

Mr. Taylor: I re-offer them, your Honor.

Mr. Cole: Same objection, your Honor.

The Court: I think you should spell out what item it is that each of the checks was in connection with the operation of the Eastern Star.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Were all of these checks, Mr. Kupoff, issued in connection with and in payment of accounts of the North Star Mining Company? A. Yes, sir.

Q. Were they issued on the dates that these checks—on the date that shows on the check?

A. Yes, sir.

Q. And Paul Drazenovich, when he was a partner, was he authorized to sign checks?

A. Yes, that's his signature showing on some checks there at the end. [38]

Mr. Taylor: I re-offer them, your Honor.

Mr. Cole: Same objection, your Honor, but if Mr. Taylor will show that these checks were issued in payment of expenses incurred by the North Star Mining Company in the operation of the Eastern Star Mining venture in 1942, then I will have no objection but until he shows that they were in payment of expenses in connection with this mining operation, they are irrelevant.

The Court: Yes, I think Mr. Taylor believes he has shown that, but I don't think you have shown that satisfactorily.

Mr. Taylor: I don't know how I can do any more, your Honor. Every objection that Mr. Cole raised at this time has been satisfactorily shown.

The Court: I feel the objection is still well taken.

Q. (By Mr. Taylor): Now, Mr. Kupoff, were these checks issued by you in payment of expenses of the North Star Mining Company during the time

(Testimony of Nick Kupoff.)

the North Star Mining Company was operating the mine on the Eastern Star Claim which belonged to Mike Stepovich?

A. Yes, sir, it was.

Mr. Taylor: I re-offer them.

The Court: Well, I will permit them to be received.

Clerk of Court: Exhibit F.

(The envelope with checks previously marked Plaintiffs' Identification No. 6 was received in evidence as Plaintiffs' Exhibit F.)

Clerk of Court: Twenty-nine checks.

Mr. Taylor: I would like to have this marked for identification, not the blank checks, just the check stubs.

Clerk of Court: Plaintiffs' Identification No. 7.

(Check stubs in bound check book were marked Plaintiffs' Identification No. 7.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 7, referring particularly to this part of the identification, and ask you to state—examine those, and state if you can what they are.

A. Well, these are what I call the stubs of the checks out of regular bank book, stubs out of regular bank book, same checks as in exhibit one, even they are same color.

Q. And did you make those? Did you write those?

A. No, sir, the bookkeeper has done that.

Q. The bookkeeper did that. A. Yes.

(Testimony of Nick Kupoff.)

Mr. Taylor: If the Court please, I would like to offer these in evidence as an exhibit, for the reason that two or three checks evidently became lost, that it was the latter part of the making of the checks, and evidently they were not returned to the bank or if they were returned to the bank, why, they were not kept, and for that reason I just would like to introduce these for the purpose of proving that these other checks were issued. It just pieces it out, your Honor. [40]

If counsel would like to check them against the checks, it will show that there were two checks that were issued that we are unable to find.

Mr. Cole: No objection.

The Court: Identification 7 will be received.

Clerk of Court: Exhibit G.

(The check stubs previously marked Plaintiffs' Identification 7 were received in evidence as Plaintiffs' Exhibit G.)

Mr. Taylor: We might be able to save room if maybe we could remove those blank checks.

The Court: They will do no harm.

Q. (By Mr. Taylor): Now, Mr. Kupoff, at any time at the latter part of your operations on Eastern Star Claim, were you approached by Mr. Stepovich in regard to an indebtedness of the partnership?

A. You have to explain that plain what you mean.

Mr. Taylor: I would like to have this marked, re-marked—it has been marked once, but re-marked for this suit.



(Testimony of Nick Kupoff.)

Clerk of Court: Plaintiffs' Identification No. 8.

(Statement dated 8/8/42 from Mike Stepovich was marked Plaintiffs' Identification No. 8.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I will hand you Plaintiffs' Identification No. 8 and ask you to examine that and state, if you can, to the jury what that document is. [41]

A. Do you want me to read each item or just mention——

Q. No, just a general statement as to what it is.

A. This is a statement, August 8, 1942, which Mike Stepovich made, and I paid before, and the amount is there and his signature is there and everything else.

Mr. Taylor: And I would like to have that introduced in evidence, Your Honor, as Plaintiffs' Exhibit H.

Mr. Cole: No objection, Your Honor.

The Court: It will be received.

Clerk of Court: Exhibit H.

(Statement dated Aug. 8, 1942, from Mike Stepovich, previously marked Plaintiffs' Identification 8, was received in evidence as Plaintiffs' Exhibit H.)

Q. (By Mr. Taylor): Now, just describe, Mr. Kupoff, the various items that you were billed for by Mr. Stepovich—you and your partner?

A. Well, the first item, back royalty \$145.92, wood \$10 a cord and \$6 a cord, \$111. That is three kinds of wood, it shows three places.

(Testimony of Nick Kupoff.)

Q. Just state briefly and the total sum there, Nick.

A. Caterpillar rent under the lease, July payment, \$250. Groceries, inventory what he had there, \$43.03. Royalty, August 2, 1942, clean-up, based on \$27.00 an ounce, 48 ounces,  $33\frac{1}{3}$  percent of \$1,296, \$432.00. Caterpillar, 22, \$45.65.

Waechter Brothers, that was meat market, \$138.34.

The total is \$1,165.94.

Q. And what, if anything, was done by the partnership in connection with that claim, Mr. Kupoff?

A. I didn't get you exactly.

Q. I say: what did the partnership do with regard to that particular claim, that statement he gave you?

A. Well, they authorized me to give him a check and pay for it, that's all.

Q. Mr. Kupoff, I hand you one item of Exhibit F.

A. This is the check made out to Mike Stepovich, the very same amount, August 8, 1942, and made out to Mike Stepovich, eleven hundred and—what is that, two or nine—\$1120.29, and it is signed by myself, North Star Mining Company by my name.

Q. What was that check for, Nick?

A. That was to cover, I don't know what you want to call it, debt between my company and Mike Stepovich.

Mr. Taylor: I overlooked one exhibit here, Your Honor. I would like to have that marked for identification.

(Testimony of Nick Kupoff.)

Clerk of Court: Plaintiff's Identification No. 9.

(Assignment of partnership interest by Paul Drazenovich to Kupoff and Zukoev, was marked Plaintiff's Identification No. 9.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Identification [43] No. 9 and ask you to glance at that and state if you can what it is.

A. This is, what do you call it—you can call it bill of sale or agreement when Paul Drazenovich moved out of the partnership.

Q. And assigned his interest to you and Mr. Zukoev? A. In North Star Mining Company.

Mr. Taylor: I would like to have that introduced in evidence as Plaintiffs' Exhibit I.

Mr. Cole: No objection, Your Honor.

The Court: It will be received.

Clerk of Court: Exhibit I.

(Assignment of partnership interest by Paul Drazenovich to Kupoff and Zukoev, previously marked Plaintiffs' Identification No. 9 was received in evidence as Plaintiffs' Exhibit I.)

Mr. Taylor: I would like to have that marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 10.

(The creditor's claim was marked Plaintiffs' Identification No. 10.)

Q. (By Mr. Taylor): Mr. Kupoff, I will hand you Plaintiffs' Identification No. 10 and ask you to take a look at that and state what it is.

(Testimony of Nick Kupoff.)

A. This is one that the Court give the order to close the company.

Q. Look again Nick. Read that. [44]

A. Oh, yes, this is what Mike got through the Court, he got my bills, in other words, pick up what I owe here and here and there so he can get——

Q. Nick—maybe I had better ask him a direct question.

The Court: You may try it.

Q. (By Mr. Taylor): Nick, is this not the creditor's claim you filed in the estate of Mike Stepovich, deceased?

Mr. Cole: I think that is a leading question, Your Honor.

Mr. Taylor: It is a leading question.

The Court: There is no doubt.

Mr. Taylor: I am not making any bones about a leading question now.

What is the answer?

The Court: I will permit the answer.

A. Well, I still can't get that in my head.

Q. (By Mr. Taylor): I asked you if that is the creditor's claim you made against the estate of Mike Stepovich in the sum of \$106,791?

A. Yes. I say "yes."

Mr. Taylor: If the Court please, I——

The Court: Why don't you show it to Mr. Cole? Maybe he should have seen it originally.

(Mr. Taylor handed document to Mr. Cole.)

Mr. Cole : I have no objection, Your Honor. [45]



(Testimony of Nick Kupoff.)

The Court: It will be received.

Clerk of Court: Exhibit J.

(Creditor's claim for \$106,791 filed against estate of Mike Stepovich, previously marked Plaintiffs' Identification No. 10, was received in evidence as Plaintiffs' Exhibit J.)

Q. (By Mr. Taylor): Now, Nick, after you had a settlement with Mike Stepovich in relation to a claim and demand in the sum of \$1,120, what did you then do? It was the settlement on the 8th day of August, 1942.

A. Well, I went back and kept on working.

Q. And now we come back to this working part, Nick. Now, after you had driven off the drift to the right of the way you were going about forty feet and then came back and then you went toward where the pay streak was, how far did you say you then drove the drift?

A. Well, roughly one hundred and sixty or eighty feet from that point.

Q. And what, if anything, did you do while you were driving that drift to test the ground?

A. Well, we take a pan of the dirt——

Q. A pan?

A. It looked like a dish, pan, and put the dirt in and wash them and if it shows any gold, why, the direction it shows better, that is where you dig.

Q. And then how far did you follow that—after you found that indication of pay, how far did you go?

(Testimony of Nick Kupoff.)

A. Like I say, we went about a hundred sixty to eighty feet, I don't know exactly.

Q. And then after you went that one hundred sixty or one hundred eighty feet, what was the result of your pannings after you had reached that distance?

A. It was pretty good panning. It shows better than any other place, so we widened out the face, what we call the face, where the gravel is, instead of digging one hole, we cross cut it and make a face out of it.

Q. And you stated that it showed better there than it had at any other place, Nick. A. Yes.

Q. Will you state when you opened up this face how you took your samples for panning?

A. The face could be anywhere from four feet to eight feet. It depends on the dirt working down.

Q. How was it at that particular place where you got into this and then you opened up the face?

A. I think it was somewhere around six feet, the pay gravel.

Q. So then when you would take a sample to pan, how would you take that sample?

A. Well, I would take it from top to bottom. [47]

Q. How would you get that sample?

A. Well, you hold your gold pan there and take a pick and keep on picking down to the bottom and you get full face sample.

Q. So in that way it would give a sample clear for that full six feet? A. That's right.

Q. Was that face frozen? A. Yes, sir.

(Testimony of Nick Kupoff.)

Q. And what were the results of that panning? What pans would you get?

A. I would say an average of from fifty cents to dollar each pan; however, I don't know the exact penny but——

Q. And to get that average, Nick, were some of them a little low and some of them quite high?

A. Well, that's right.

Q. Now, you say you opened up the face. Just describe what you did when you came to this particular area, what you thought was good ground. Did you drive on through it?

A. No, we, instead of driving ahead, we drove towards the right and towards the left, and that would give us about thirty feet of face there.

Q. Then, any of that thirty feet, you could just start mining that and taking it out; is that right?

A. That's right, we put down the steam pipes there and [48] thawed out, and we could dig it and shovel it out.

Q. How far did you drive on into that face at any one place?

A. Well, I think, I'll say ten or twelve feet.

Q. And how were the values holding up as you went into that ten or twelve feet?

A. Well, as far as I know, holding better——

Q. They were better?

A. ——the further we go.

Q. Do you know approximately what time or the date that you struck that good pay?

A. Well, it was either the last part of July or

(Testimony of Nick Kupoff.)

the first part of August. It was pretty close around there. I don't remember the exact date.

Q. Nick, what is customarily a pan, when you take a pan of dirt, what is it usually equivalent to?

A. A pan of dirt is, all miners figure, take a shovelful of dirt and put it in the pan. That is a No. 2 shovel, not a coal shovel.

Q. Say, you were panning, and you got a fifty-cent pan, that would be fifty cents to a shovelful; is that right?      A. Yes.

Q. And if you got a dollar, it would be a dollar to a shovelful; is that right?

A. That's right. [49]

Q. How many pans, Nick, is it customary to consider to a cubic foot?

A. I think it is seven. I am not sure, but I think it is seven pans to a cubic foot.

Q. And then just carrying out that logic and conclusion, then, it would be seven times twenty-seven pans in a yard of dirt; is that right?

A. Yes.

Q. Now, after you got into that, what you called the pay streak, how much dirt—I will withdraw that question, please.

Now, Nick, after you were operating on this face that you had opened up, do you know approximately how much of that gravel in the pay streak that you removed from its place?

A. Well, I say somewhere around four, five hundred.



(Testimony of Nick Kupoff.)

Q. Then, as you were taking that out of the drift and up to the surface, what were you doing with it?

A. Well, we sometimes, partners after work hours we go down and sluice some of, and then maybe an hour or maybe so we using every night a little water.

Mr. Cole: I didn't hear that last part of that answer please.

The Court: Let's see if the reporter got it.

(Thereupon the reporter read the last answer.)

Q. (By Mr. Taylor): And then after you struck this rich dirt, Mr. Kupoff, [50] did you have any clean-ups? A. No, sir.

Q. And what was the reason that you did not clean up?

A. Well, the Marshals come out and close us down.

Mr. Taylor: I would like to have this marked for identification, please.

Clerk of Court: Plaintiffs' Identification No. 11.

(Certified copy of summons and complaint, No. 4950, marked Plaintiffs Identification No. 11.)

Q. (By Mr. Taylor): Mr. Kupoff, I hand you Plaintiffs' Identification No. 11 and ask you to look at that and state if you can what it is. It is not very legible. You will have to look close.

The Court: Maybe it is recess time, Mr. Taylor,

(Testimony of Nick Kupoff.)

and I am going to suggest maybe you can go over some of those matters with Mr. Cole.

Mr. Taylor: It is a very poor copy, Your Honor.

The Court: It is recess time now, and maybe you can go through some of your expected documents with Mr. Cole.

Mr. Taylor: Yes, sir.

The Court: So members of the jury, please heed the admonition I previously gave to you, and we will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes. [51]

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court has reconvened.

The Court: Are the parties satisfied that the thirteen jurors are present in the box without a roll call?

Mr. Taylor: Yes, Your Honor, we are.

Mr. Cole: Yes, Your Honor.

The Court: Very well, proceed.

Mr. Taylor: Do you have any objection to this?

Mr. Cole: In the interest of saving time, the defendant will stipulate that Plaintiffs' Identification 11 may be admitted as Exhibit K, and it is a copy of a summons issued in the case of Mike Stepovich v. James Zukoev, et al.

The Court: Very well, it will be received.

Clerk of Court: Exhibit K.

(Certified copy of summons and complaint in Case No. 4950, previously marked Plaintiffs')

(Testimony of Nick Kupoff.)

Identification 11, was received in evidence as Plaintiffs Exhibit K.)

Mr. Cole: I will also stipulate that Identification No. 12 may be admitted as Plaintiffs' Exhibit L.

Clerk of Court: That has no mark of this trial.

The Court: That will be Identification 12, Mr. Hall?

Clerk of Court: That is right, Your Honor. That's the new identification number.

(Copy of writ of attachment in Case No. 4950, was marked Plaintiffs' Identification 12.)

Mr. Cole: That Plaintiffs' Identification 12 may be received [52] as Exhibit L, and it is a copy of a writ of attachment issued in the case of Mike Stepovich v. James Zukoev, et al.

The Court: Very well, it will be received.

Clerk of Court: Plaintiffs' Exhibit L.

(Copy of writ of attachment issued in Case 4950, previously marked Plaintiffs' Identification 12, was received in evidence as Plaintiffs' Exhibit L.)

Clerk of Court: This is Plaintiffs' Identification No. 13.

(Original of memorandum agreement re assuming obligation for indebtedness of North Star Mining Co., was marked Plaintiffs' Identification No. 13.)

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification No. 13 may be admitted into

(Testimony of Nick Kupoff.)

evidence as Plaintiffs' Exhibit M, and that it is an original of a memorandum of agreement executed by Nick Kupoff, and Paul Drazenovich, and in which Mr. Kupoff apparently in behalf of the partnership assumes obligations of the partnership.

The Court: Very well, it will be received.

Clerk of Court: Exhibit M, Plaintiffs' Identification No. 13.

(The memorandum agreement previously marked Plaintiffs' Identification No. 13, was received in evidence as Plaintiffs' Exhibit M.)

Clerk of Court: Plaintiffs' Identification No. 14.

(Original of letter from E. B. Collins, to defendant Kupoff, dated July 24, 1945, was marked Plaintiffs' Identification No. 14.) [53]

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification No. 14 may be admitted into evidence as Plaintiffs' Exhibit N, and that it is an original of letter signed by E. B. Collins, in which it is stated that the claim of James Zukoev, Mike Kitoff, Nick Kobak, co-partners of the North Star Mining partnership against the estate of Mike Stepovich, in the amount of \$106,791.29, has been rejected by the executrix of the estate.

The Court: Very well. It will be received.

Clerk of Court: Exhibit N.

(Letter from E. B. Collins to Kupoff, July 24, 1945, previously marked Plaintiffs' Identification No. 14, was received in evidence as Plaintiffs' Exhibit N.)



(Testimony of Nick Kupoff.)

Mr. Cole: The defendant will stipulate that Plaintiffs' Identification 15 may be introduced into evidence as Plaintiffs' Exhibit O, and that it is a certified copy of a minute order entered in the case of Mike Stepovich v. James Zukoev, et al., which shows that at a hearing held in this Court on November 24, 1942, at which plaintiff was represented by E. B. Collins, and the defendants by Julien A. Hurley, that Mr. Collins moved for a continuance of the trial and the motion for continuance was resisted by Mr. Hurley, and then it was ordered that the motion for a continuance be denied, after which Mr. Collins moved for a voluntary non-suit and it was ordered that the motion be granted and judgment of non-suit entered in the sum of blank dollars [54] to be taxed by the Clerk.

The Court: It will be received.

Clerk of Court: Exhibit O.

(Certified copy of Minute Order in Case No. 4950, marked Plaintiffs' Identification No. 15, was received in evidence as Plaintiffs' Exhibit O.)

Clerk of Court: Plaintiffs' Identification No. 16.

(Marshal's docket sheet, Case No. 4950, was marked Plaintiffs' Identification No. 16.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification No. 16—well, I think I would like to renege on this stipulation.

(Testimony of Nick Kupoff.)

The Court: Very well.

Mr. Cole: You better introduce that in the proper way.

Clerk of Court: Plaintiffs' Identification No. 17.

(Copy of letter from Mike Stepovich to U. S. Marshal was marked Plaintiffs' Identification No. 17.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification No. 17 as Plaintiffs' Exhibit P, and it is a copy of a letter written by Mike Stepovich to the United States Marshal, J. A. McDonald, which reads as follows:

"Re: Mike Stepovich vs. James Zukoev, et al., #4950, District Court

"You are hereby authorized to dispense with the services of a keeper and watchman on the premises under [55] attachment in the above-entitled cause, and I will not hold you responsible for any loss or damages occasioned by not providing a keeper or watchman from this date under said attachment.

"This action is taken for the reason that I do not deem it necessary under the circumstances to incur the costs necessarily involved in the maintenance of a keeper.

"Yours very truly,

"Mike Stepovich

Plaintiff in said action"

It is on the stationery of E. B. Collins, attorney at law, Fairbanks, Alaska.

(Testimony of Nick Kupoff.)

The Court: Very well. It will be received.

Clerk of Court: Exhibit P.

(Letter from Stepovich to U. S. Marshal McDonald, Sept. 15, 1942, previously marked Plaintiffs' Identification 17, was received in evidence as Plaintiffs' Exhibit P.)

Clerk of Court: Identification No. 18.

(Writ of attachment, Case No. 4950, was marked Plaintiffs' Identification No. 18.)

Mr. Cole: The defendant will stipulate to the admission into evidence of Plaintiffs' Identification 18 as Plaintiffs' Exhibit Q, and that it is the original of the writ of attachment issued in the case of Mike Stepovich v. James Zukoev, et al., that attached to it is the original of the Marshal's return on the attachment. [56]

The Court: It will be received.

Clerk of Court: Exhibit Q.

(Writ of attachment, in Case No. 4950, previously marked Plaintiffs' Identification No. 18, was received in evidence as Plaintiffs' Exhibit Q.)

Mr. Cole: Do you have anything further, Mr. Taylor?

Mr. Taylor: No, that is all.

The Court: Well, much has been accomplished and much time saved by stipulation of counsel.

Mr. Taylor: If the Court please, while this witness is on the stand, I would like to introduce into evidence Plaintiffs' Identification 16, which pur-

ports to be a page of the U.S. Marshal's Office Docket, together with a certification of the United States Marshal by his Chief Deputy, John L. Buckley, that it is a true and correct copy of the official record appearing in the Office of the Marshal.

The Court: Is there any objection to what purports to be a certified copy?

Mr. Cole: Yes, Your Honor, because I don't think the United States Marshal has any right, official or statutory right, to certify to a document as being a true and correct document on file in his office. I think if that is true, it has to be done through the Clerk of the Court and the Judge of any Court, and it is simply and purely hearsay. Therefore, the defendant objects.

Mr. Taylor: Your Honor, I believe the law is that any [57] official act of a judicial or executive officer that is made in the regular course of business may be introduced in evidence over the certificate of the officer in charge of the office. I think, Your Honor, if I am not mistaken, the Circuit Court of Appeals commented upon the failure to allow that in evidence.

Mr. Cole: I object to that remark, in the first place, and in the second place they didn't say that in the Opinion.

The Court: I will let Mr. Taylor point it out to me in the Opinion. It is right here.

Mr. Cole: And I ask that that remark be stricken from the record until Mr. Taylor does point it out.

Mr. Taylor: I say I assumed that it was.



The Court: Well, I will rule on it as soon as you determine whether it is.

Mr. Taylor: If the Court please, I will not read this, but I would like to call attention to the language of the Circuit Court of Appeals regarding the return of the United States Marshal and a statement in regard to its admissibility.

The Court: Well, but don't we have two different matters we are discussing, one is the return of the official. There is no doubt about its admissibility. But the objection here is that this is inadmissible because it is at most a certified copy of a certificate, and also purports to cover certain information that the original was "offered, admitted, and marked as Plaintiff's Exhibit G, Kupoff et al., plaintiff vs. Stepovich, defendant" in a certain civil cause. [58]

It looks to me like there has been a substitution of records. The only matter before me is whether or not the Marshal may certify such a matter, and for the time being I am going to sustain the objection.

Mr. Taylor: If the Court please, may we approach the bench?

The Court: Certainly.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: The plaintiffs feel that in view of the fact that the Circuit Court of Appeals directed this Court to allow in evidence the return of the Marshal, which was certified by him, that it also

(Testimony of Nick Kupoff.)

should allow in evidence a copy of the records of the Marshal's Office, the docket entries.

The Court: I don't think the one follows the other at all. The Court did comment and say that the return of the Marshal was good evidence, and I think it is and should have been received.

Mr. Taylor: By the same token, the Marshal makes a certificate on his return, but he is also making a certificate separate and attached to the certificate as to the docket entries in his office.

The Court: If you can convince me that the Marshal can certify to a copy in his certificate which is sufficient to enable it to be received in evidence, I will change my ruling. [59]

Is he such an official that can certify to a record? It is a simple matter. He is down the hall and can identify the original.

Mr. Taylor: But that was certified by the United States Marshal.

The Court: I see no serious problem.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

Mr. Taylor: If the Court please, I would like to also have—will you mark this for identification, Mr. Clerk?

Clerk of Court: It will be Identification No. 19.

(Map by Joe Ulmer of Eastern Star Claim was marked Plaintiffs' Identification No. 19.)

Q. (By Mr. Taylor): Now, Nick, I am going to hand you Plaintiffs' Identification No. 19 and ask you to take a look at that and state whether

(Testimony of Nick Kupoff.)

or not that is a true representation of the workings in the Eastern Star Claim?

Mr. Cole: Well, your Honor, I think the first question is——

Mr. Taylor: Just a moment. Let him take a look at it before you object.

Mr. Cole: May I make an objection?

The Court: I think counsel certainly has a right to make an objection.

Mr. Cole: I think he should ask first if he knows what it [60] is, and if he does, then he could proceed from there, but it contains a lot of evidentiary dangers which I think Mr. Taylor should be required to proceed with properly at this time.

The Court: The question is very leading and broad. I don't think there is any doubt about that. The witness is now examining it and will state if he knows what it is.

Q. (By Mr. Taylor): Do you know what it is, Mr. Kupoff?

A. Well, this is a kind of a sketch of the claim and a sketch of the workings, done by engineer.

Q. By what engineer?

A. Joe Ulmer, and I remember——

Mr. Cole: I think, your Honor, we should proceed by question and answer here.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. Kupoff, does that fairly represent the workings in the Eastern Star Claim as you knew them?

(Testimony of Nick Kupoff.)

A. That's right.

Q. And were you present at the time the survey was made of that claim, the underground survey, by Mr. Ulmer?           A. Yes.

Q. And did Mr. Ulmer testify in the previous case?

Mr. Cole: I object to that. It has no relevancy here.

The Court: Sustained. [61]

Mr. Taylor: If the Court please, I have one reason for introducing this in evidence. It shows the boundaries of the property, and I would like to state that Mr. Ulmer, who was a witness——

Mr. Cole: I object to Mr. Taylor's testifying. He is saying what it is and it hasn't been introduced in evidence. As soon as he gets it in evidence, then he can testify in connection with it, but don't testify concerning it until we get it into evidence.

Mr. Taylor: We are going to offer it in evidence, your Honor.

The Court: Has Mr. Cole been given an opportunity to examine it?

Mr. Taylor: I don't know. He has done a lot of talking about it.

The Court: He should have an opportunity to see it before you offer it.

Mr. Taylor: O.K., (handing document to Mr. Cole).

Mr. Cole: The defendant objects to its admissibility into evidence, on the ground again that it is



(Testimony of Nick Kupoff.)

hearsay, and I am prepared to state in detail the reason why it is hearsay, if the Court please.

The Court: I will be glad to examine it. I don't know the purpose for which it is offered. If it is offered for illustrative purposes——

Mr. Taylor: Your Honor, that is what it is offered for, and [62] that is because we have prepared a drawing without any legend on it at all for the purpose of showing the underground workings in the Eastern Star Mine.

The Court: Will you show it to Mr. Cole again now that he understands it is being offered for the purpose of illustration to see whether or not he has any objection to it for that reason?

Mr. Taylor: So it can be compared, your Honor, with just a plain drawing of the workings.

Mr. Cole: Well, as to the mere fact that broad workings, underground workings of the plant, I have no objection, but there are on this Identification some markings, figures, and symbols which are hearsay, and I think that they are prejudicial to the defendant's case, and I think that if Mr. Taylor wishes to show in general nature the underground workings here, he can ask this witness, who should be prepared and qualified to testify to them, but here is a map containing measurements and other symbols made or purporting to represent distances, drifts claimed, and other related matter—and other related matter, your Honor, which is pure hearsay.

The Court: Yes, there has been no foundation laid by this witness, and of course no other witness

(Testimony of Nick Kupoff.)

has testified to this identification, that would permit me to receive it, except for very limited purposes, and counsel has called my attention to the fact that there are purported measurements here that wouldn't be [63] binding on anyone and I cannot admit it.

I notice you with something there, Mr. Taylor. Is that a larger plat in a general way for the purpose of illustration?

Mr. Taylor: It is, and it is to scale, your Honor.

The Court: Well, when you talk about "scale"—well, I am going to at this time sustain the objection to Plaintiffs' Identification 19.

Mr. Taylor: If the Court please, in view of the Court's ruling, at this time I move that we excuse this witness and I will read the testimony of Mr. Joe Ulmer, the engineer who made this on the 14th day of August, 1942, and incorporate his testimony into this record. Mr. Ulmer is not in town. He is up near Circle Hot Springs.

The Court: I suppose he could have been here. What I am trying to find out, Mr. Taylor: are you trying to get that map into evidence for more than purposes of illustration now, as I understand.

Mr. Taylor: No, I would put this in for the purpose of illustration to show the jury what is up—I don't want to conceal anything from the jury.

The Court: I like to have charts and plats that will assist the jury, but certainly not if they contain some legend that is not borne out by the

(Testimony of Nick Kupoff.)

testimony. Very often maps are very helpful to the jury and the Court, but of course——

Mr. Taylor: If Mr. Cole can intelligently point out to me [64] anything that is on this map that would be prejudicial to the defendant, I would certainly stipulate to remove it. That is a drawing made by a competent engineer.

The Court: There has been no proper foundation laid for it as yet.

Mr. Cole: I don't know if I can convince Mr. Taylor, but I would like an opportunity to point out to the Court specifically my objections, if the Court wishes, but otherwise I——

The Court: Does some other theory apply to the larger plat that you have there, Mr. Taylor?

Mr. Taylor: That is made also by an engineer, but there is no legend on it at all. It is just to show the underground workings of what took place.

Mr. Cole: He hasn't offered this yet.

The Court: No, but I am wondering whether he perhaps thought that he must get the smaller one in before he could get the larger one, but it is possible that the larger one may serve your purpose. I don't know whether it will or not. But will the large one serve your purpose and the purposes of the jury?

Mr. Taylor: Yes, I believe it would, your Honor, if we could put just the distances of the length of the plant. With the addition of that I think it will serve the purpose, because that has all been testified to, as to the approximate distances.

(Testimony of Nick Kupoff.)

The Court: Maybe you can establish that by witnesses that can put the marks on the larger plat. I haven't seen it. [65]

Mr. Taylor: Perhaps Mr. Cole might stipulate as to these measurements which were made by this engineer would be placed on the various segments of this drift that was driven some distance away from the shaft which was used for hoisting the gravel.

The Court: I am not going to put him in the position of submitting a request for admission to him in the presence of the jury. Perhaps it is something that can be worked out, perhaps not, but if not, we must proceed in the usual way to rule on the evidence, and I could not receive that detailed plat at this time, which purports to give accurate measurements, because there has been no proper foundation laid.

Mr. Taylor: I have moved the Court for permission to introduce the evidence of Joe Ulmer, who has qualified as a mining engineer, who prepared this plat, and read the testimony to the jury. It is a fairly short time now, but I would like to do that tomorrow morning. It has been testified to.

The Court: Do you have something else you can go on with here for five or ten minutes with this witness? We can get back to that in the morning.

Mr. Taylor: Yes, your Honor.

I would like to have that marked for identification.

Clerk of Court: Plaintiffs' Identification 20.



(Testimony of Nick Kupoff.)

(File in Cause No. 4950 was marked Plaintiffs' Identification No. 20.)

Mr. Cole: If I may be permitted to inspect it, I may be [66] able to stipulate to its admission.

The Court: You may inspect it.

Mr. Cole: We might save a little time, your Honor, if I could read this after the close of the day, because it is quite lengthy, and perhaps I can stipulate to its admissibility.

The Court: Is that satisfactory, Mr. Taylor, or do you wish to proceed?

Mr. Taylor: I have no objection. I have some other things here I would like to introduce at this time.

The Court: Very well.

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Exhibit I. This hasn't been marked, or has it? That is the old identification. Pardon me.

Clerk of Court: Plaintiffs' Identification No. 21.

(Four copies of notices of attachment were marked Plaintiffs' Identification No. 21.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you Plaintiffs' Identification No. 21, which consists of four parts, and ask you to state what they are.

A. These are attachments what Marshal brought out there and stick them all over buildings and—

Q. And was that brought out in conjunction with the writ of attachment that was served on you? [67]

A. Yes.

(Testimony of Nick Kupoff.)

Mr. Taylor: If the Court please, we would like to have those marked or introduced in evidence as Plaintiffs' Exhibit R.

Mr. Cole: I don't think they have been properly identified but we will stipulate to their admissibility.

The Court: They will be received.

Clerk of Court: Exhibit R, 1 to 4, inclusive.

(The four copies of notices of attachment, previously marked Plaintiffs' Identification No. 21, were received in evidence as Plaintiffs' Exhibit R-1, R-2, R-3 and R-4, respectively.)

The Court: I would like to see them after they are marked.

Clerk of Court: Yes (handing exhibit to the Court).

Mr. Taylor: If the Court please, I have just one thing. There was some testimony in regard to the three clean-ups and I would like at this time to have these marked. These could be marked as one identification, I believe.

Clerk of Court: Plaintiffs' Identification No. 22.

The Court: Three parts?

Clerk of Court: No, just two parts, your Honor, the bank book and the deposit slip, sir.

(One bank book and one deposit slip were marked Plaintiffs' Identification No. 22.)

Q. (By Mr. Taylor): Mr. Kupoff, I hand you Plaintiffs' Identification No. 22 and ask you to state, if you can, what those are.

A. Well, this first part is a deposit slip under the name [68] of North Star Mining Company. The

(Testimony of Nick Kupoff.)

second part is a bank book, which shows the amount.

Q. And what were those deposits, or what source were those funds derived from?

A. It comes from the different clean-ups, two different clean-ups we had.

Mr. Cole: No objection.

The Court: It will be received.

Clerk of Court: Exhibit S.

(The bank book and deposit slip, previously marked Plaintiffs' Identification No. 22, were received in evidence as Plaintiffs' Exhibit S.)

Mr. Taylor: If the Court please, could we take an adjournment at this time?

The Court: Yes, indeed, and I trust that there will be a number of things that can be resolved between now and ten o'clock tomorrow morning, but I think a good deal has been accomplished today. Members of the jury, please heed the admonition I have previously given to you, not to discuss the subject matter of this trial with anyone nor among yourselves, and do not form or express any opinion thereon until the case is finally submitted to you, and Court will now adjourn until ten o'clock tomorrow morning.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 5:00 p.m., an adjournment was taken to 10:00 a.m., October 15, 1957.) [69]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 16, 1957, before

the Honorable Vernon D. Forbes, District Judge, and a Jury.

Clerk of Court: Court is now in session.

The Court: Are the parties ready to proceed?

Mr. Cole: The defendant is ready.

Mr. Taylor: The plaintiff is ready.

The Court: The Clerk will please call the roll of the jury.

Mr. Taylor: We will stipulate all the jurors and the alternates are present.

Mr. Cole: And so will the defendant.

The Court: Very well. You may proceed.

Mr. Taylor: If the Court please, I have just now contacted Mr. Crawford. I have not had a chance to go over these maps, field drill logs, field logs of the property, and perhaps if we had about a 15-minute recess perhaps counsel and myself could stipulate in regard to some of these matters which will be going in.

The Court: Do you wish to interrupt the testimony of Mr. Kupoff?

Mr. Taylor: Yes. Mr. Crawford is quite busy getting ready to go "Outside." If possible, I would like to expedite taking his testimony.

The Court: I see. Well, does the defendant have any particular objection? [70]

Mr. Cole: I don't think there is any possible chance of the defendant stipulating to any of these exhibits that Mr. Taylor has that Mr. Crawford has with him, so I see no reason for taking a recess. I don't have any particular objections to taking the testimony of Mr. Crawford at this time, but I cer-



tainly don't like to be placed in the position of having to stipulate to irregularities at every stage of the proceedings, and I don't know when Mr. Crawford is going to go "Outside" and I don't know if he can't be here this afternoon just as easily as he can be here now.

The Court: It is your desire to interrupt the direct testimony of Mr. Kupoff and to take Mr. Crawford now?

Mr. Taylor: Yes, that was the idea but I stated I thought——

The Court: Maybe we can make up for it later. I will declare a 15-minute recess, and we will try to make up for it this afternoon by reconvening at 1:45 instead of 2:00 o'clock.

Mr. Cole: Yes, that would be satisfactory, your Honor.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you. We will take a 15-minute recess.

Clerk of Court: Court is recessed for 15 minutes.

(Thereupon a 15-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties wish the roll call of the jury?

Mr. Taylor: We will stipulate, your Honor, that the jurors [71] and the alternate are present.

Mr. Cole: As will the defendant.

The Court: Very well. Are you ready to proceed, Mr. Taylor?

Mr. Taylor: Yes, your Honor. If the Court please, Mr. Kupoff was on the stand. Mr. Crawford

of the United States Mining, Smelting and Refining Company is present, and I would like to take him out of turn for the purpose of having him return to his office.

The Court: Does the defendant have any valid objection to interrupting the direct examination of this plaintiff?

Mr. Cole: I don't know what a valid objection is, your Honor, in a case of this nature. Mr. Taylor has had 14 years to prepare the case. He asks for a 15-minute recess. I sat here waiting for 23 minutes, waiting for a stipulation. He hands me something and he spends all his time talking with the witness and then he wants to take him out of order. I don't think it is proper, but I have no valid objection, I think.

Mr. Taylor: It comes as a surprise. I wanted to see if he would stipulate, and he went out of the Court.

Mr. Cole: I didn't go out of here. I sat right here. That was the reason for the continuance.

The Court: Anyway, I will permit Mr. Crawford to be called out of order.

Let's proceed. [72]

### JAMES D. CRAWFORD

called as a witness in behalf of the plaintiffs, after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Taylor): Will you state your name, please?      A. James D. Crawford.

(Testimony of James D. Crawford.)

Q. And where do you reside?

A. Fairbanks, Alaska.

Q. And what is your occupation, Mr. Crawford?

A. Vice President of the United States Smelting, Refining and Mining Company, and general manager of the Alaskan operation.

Q. And how long have you been connected with the United States Smelting, Refining and Mining Company?

A. Since April 15, 1929.

Q. And how long have you been connected with the Alaska operations?

A. Since that time.

Q. Now, calling your attention to—pardon me, are you a member of any professional body?

A. Yes.

Q. Of what?

A. Mining Engineers.

Q. You are a graduate engineer, are you?

A. I am.

Q. Are you acquainted with a certain claim located on Fish [73] Creek known as the Eastern Star Claim or Association?

A. Yes.

Q. And have you been on that property, Mr. Crawford?

A. Yes.

Q. And did you make or did you have made a tracing or a blue print of that claim as to drill holes and directions and boundaries?

A. Yes.

Mr. Taylor: I would like to have this marked for identification.

Clerk of Court: Plaintiffs' Identification No. 23.

(The print of a portion of prospect map was marked Plaintiffs' Identification No. 23.)

(Testimony of James D. Crawford.)

Q. (By Mr. Taylor): Now, Mr. Crawford, I will hand you Plaintiffs' Identification No. 23 and ask you to state what that particular identification is.

A. That is a print of a portion of prospect map originally prepared by Fairbanks Exploration Company in 1934 and revised to February 22, 1951, showing——

Mr. Cole: Your Honor, I don't think he should be allowed to testify as to what it is. He can only identify it and state everything it contains.

The Court: I think he is attempting to identify it.

Mr. Taylor: I think he is going into identification matters. [74]

Mr. Cole: There is great danger in stating what it contains and everything that is in it before it is admitted into evidence.

The Court: Certainly he is not going to be permitted to go into detail as to what it contains.

A. (Continuing) ——showing the company's record of their prospect drilling on the claim and its outline.

Q. (By Mr. Taylor): That is taken from the drill logs, is it, Mr. Crawford?

A. The drill hole information shown there is posted from the company's records, the company's records of drill logs they have in their possession.

Q. Does this matter reflect what the drill logs showed at each hole that was drilled?

A. Yes.



(Testimony of James D. Crawford.)

Q. And does this reflect the depth to which those drill holes went?      A. Yes.

Mr. Taylor: If the Court please, at this time I would like to offer this in evidence as Plaintiffs' Exhibit T.

Mr. Cole: The defendant objects, your Honor, on the ground that it is hearsay, and I have a lot of authority on that point if the Court wishes.

The Court: I think your objection goes to the witness' statement that this is a compilation, the figures being posted [75] from the drill logs, and the drill logs are not here in evidence.

Mr. Taylor: We have them here, your Honor. I wanted to save introducing them.

Mr. Cole: Your Honor, the drill logs are not admissible unless we have the witness here who made the drills, because the drill logs themselves are just another case of hearsay.

The Court: I would see no trouble if the drill logs were actually in evidence. I am not going into how they might get into evidence, but if they were in evidence and they were posted from the drill logs and the drill logs were in evidence, I would see no evidentiary problem.

Mr. Cole: Yes.

The Court: But it is a problem now.

Mr. Cole: Yes.

The Court: In other words, the Plaintiffs' Identification 23 attempts to state facts, such as depths, and I don't believe that a proper foundation has been laid. At this time, I must deny the offer.

(Testimony of James D. Crawford.)

Q. (By Mr. Taylor): Now, Mr. Crawford, did you at any time have a position of authority that you conducted or these drillings were conducted under your supervision? A. No.

Q. And what officer of the company did?

A. The holes that were drilled by company employees were [76] drilled under the supervision of R. W. Mackay.

Q. And were they made at the time that you were connected with the company, Mr. Crawford?

A. Yes.

Q. And was Mr. Mackay an engineer?

A. Yes.

Q. Mining engineer? A. Yes.

Q. And are some of these logs, are they of the drillings by Mr. Mackay? Did Mr. Mackay prepare the drill logs, or did the drillers?

A. The drillers.

Q. Are these the official records here, Mr. Crawford, or just explain to the Court for the purpose of identifying this now, if it is one of the official records of the company, and what it is compiled from.

The Court: What are you referring to now, Mr. Taylor.

Mr. Taylor: The plat. The identification 23.

Q. (By Mr. Taylor): How was that plat brought into being as it is now?

A. The platting of the claims and of the locations——

(Testimony of James D. Crawford.)

Mr. Cole: Your Honor, I object on the ground that this is irrelevant, too, how it came into being.

The Court: I think I will permit the witness to answer this. [77]

A. The platting of the claims and the locations of drill holes and other features shown on the map is based on surveys made by company engineers. The drill hole results are based on the logs. Part of the drilling was done by employees of the U. S. Smelting Company, or, rather, the Fairbanks Exploration Company, which was its predecessor at that time. Part of the drilling was done by employees of Gold Placers, Incorporated, and those results were sold to the company.

Q. And then they are made up into a complete record of each claim, then, Mr. Crawford?

A. Yes.

Mr. Taylor: Your Honor, I am going to re-offer the plat, Plaintiffs' Identification No. 23, as Exhibit T.

The Court: Will counsel please approach the bench?

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

The Court: First, Mr. Taylor, I want to give you an opportunity to convince me as to the admissibility of the identification, and I would like to know the purpose for which you offer it.

Mr. Taylor: To show value.

The Court: Well, you are offering this particular

(Testimony of James D. Crawford.)

exhibit for what purpose? Showing value is a little general.

Mr. Taylor: Well, the values in that particular part of the claim in which these plaintiffs drifted to at the time that they [78] hit the face of the high-grade pay.

The Court: Let me analyze that for a moment—showing value. Now you show me on the exhibit that portion or portions that show the value.

Mr. Taylor: Here is a drill hole in that location (indicating). It was 48 feet deep. It showed \$2.14 per square foot at bedrock. They are based on the old value of gold of \$20.67, which should make it over three and a half.

The Court: What else of value is set forth on the plat—and I don't believe that it is admissible for that purpose.

Mr. Taylor: The drill logs would not be admissible, then?

The Court: The drill logs, with proper foundation, might be admissible, I don't know.

Mr. Taylor: We would have to get the drillers that did the drilling.

The Court: I am worried about the reliability of the entries on the plat, which is very, very important. Do you wish to be heard, Mr. Cole?

Mr. Cole: Yes. I would like to say that it is the defendant's contention that the proposed identification——

Mr. Taylor: It is an identification, not proposed.

Mr. Cole: The identification and proposed exhibit



(Testimony of James D. Crawford.)

is hearsay, and, further, it is double hearsay because it contains not only statements, written statements of evidence which is sought to be introduced to prove the truth of the matters asserted in the [79] written statement, but it also contains statements made by a prior driller which were used by the compiler of the map, and the defendant, not being able to cross examine the individual or individuals who made the first drilling nor to cross examine the individual who made the drillings on behalf of the Fairbanks Exploration Company, is prejudiced and therefore objects to the admissibility of this identification.

The Court: I feel obliged to sustain the objection, Mr. Taylor.

(Thereupon the discussion at the bench was concluded and counsel resumed their places at counsel table.)

Q. (By Mr. Taylor): Now, Mr. Crawford, is the United States Smelting, Refining and Mining Company the owners of the Eastern Star Association at the present time? A. No.

Q. What interest, if any, does the company have in this property? A. We have a lease on it.

Q. Could you say when that lease was secured?

A. September 26, 1942.

Q. That lease is still in effect, is it, Mr. Crawford? A. It is a 50-year lease.

Mr. Taylor: You may take the witness. [80]

(Testimony of James D. Crawford.)

Cross Examination

Q. (By Mr. Cole): How long has it been since you were on the Eastern Star Mining Claim, Mr. Crawford?      A. About 1942.

Q. Do you know whether the United States Smelting, Refining and Mining Company has mined this ground on which the Eastern Star Claim is located?

A. They have never done any mining on that ground.

Q. So so far as your company is concerned the mine claim is just in the same condition as it was when you leased it from Mr. Stepovich in 1942?

A. So far as I know.

Mr. Cole: No further questions, your Honor.

Mr. Taylor: That is all, Mr. Crawford.

The Court: Thank you, Mr. Crawford.

(Witness excused.)

Mr. Taylor: If the Court please, could we withdraw, then, the Identification 23?

The Court: Any objection, Mr. Cole?

Mr. Cole: No, your Honor.

The Court: It will be ordered withdrawn.

(Plaintiffs' Identification 23 was withdrawn.)

Mr. Taylor: Mr. Crawford, I will give you this back. [81]

Mr. Taylor: I recall Mr. Kupoff.

NICK KUPOFF

one of the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Taylor): Now, Mr. Kupoff, I hand you again Plaintiffs' Identification 19 and ask you to state, if you can, when that Identification was prepared.

Mr. Cole: That is irrelevant, your Honor, until it is admitted into evidence. It has nothing to do, I don't think — no foundation to show that it is admissible.

Mr. Taylor: We will connect it up, your Honor.

The Court: He is trying to lay the foundation, and I will permit the answer.

Mr. Cole: I think he should first ask him if he knows.

The Court: I will assume that he can't answer if he doesn't know.

A. This is a map made by the engineer somewhere around August 14th, I believe it was, or somewhere around there.

Q. (By Mr. Taylor): When?

A. August 14th — 13th or 14th, somewhere around there.

Q. And who was that prepared by?

A. Joe Ulmer, his name was.

The Court: You might show the year. [82]

The Witness: 1942.

Q. (By Mr. Taylor): Now, at whose request or instance was that plat prepared, that survey made?

(Testimony of Nick Kupoff.)

Mr. Cole: It is immaterial, your Honor.

The Court: I believe it is, but I am going to permit the answer.

A. To start with——

Q. (By Mr. Taylor): No, just if you know, who had that prepared?      A. Yes, I know.

Q. Who had it prepared?

A. Stepovich sent this engineer in.

Q. Who sent the engineer?

A. Mike Stepovich.

Q. And did you have any conversation with Mike Stepovich prior to the engineer coming out there regarding the boundaries of the claim?

A. Yes.

Q. And what was that conversation?

A. Well, we had a conversation, he claimed it was out of lines of the claim.

Q. Out of line?

A. Yes, out of lines of the claim, so I say "No."

Q. Did you mean outside the boundaries of the claim? [83]      A. Yes, that's what I mean.

Q. And what did you tell him?

A. I told him it was quite a ways from the boundaries, but he didn't believe it, I guess, and then he sent the engineer out to survey.

Q. Was anything said about to quit mining because you were outside the boundaries?

Mr. Cole: I think he should say who said what.

The Court: Yes, and it is leading. Sustained.

The Witness: He said we was out of boundaries. Actually it was inside.



(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): What did you say, Nick?

A. When he claimed we was out of boundaries, and naturally if we was out of boundary, we would stop going any farther, but I say we wasn't, so that time he sent out the engineer.

Q. And then that engineer was Joe Ulmer?

A. Joe Ulmer.

Q. And I believe you testified he is a mining engineer in Alaska?           A. Yes.

Q. And where did you get this plat, Mr. Kupoff?

A. Well, I demand a copy of his work, his drawings, and so he give me that copy.

Mr. Taylor: If the Court please, I am going to offer this [84] again as a plat that was prepared by the deceased, Mike Stepovich, by an engineer in his employ, showing the underground workings of the Eastern Star Association.

Mr. Cole: And the defendant objects to its admissibility on the same grounds as urged yesterday, that it is hearsay and that the plaintiff hasn't brought it within any of the exceptions to the hearsay rule. It is very prejudicial to the defendant's case, possibly.

The Court: I am going to reserve ruling at this time and we will try to dispose of that at the next recess.

Mr. Taylor: If the Court please, at this time I would like to introduce in evidence Plaintiffs' Identification 20, which is the Court file in the case of Mike Stepovich v. James Zukoev, et al.

(Testimony of Nick Kupoff.)

Mr. Cole: The defendant will stipulate as to its admission at this time, your Honor.

The Court: Very well. It will be received.

Clerk of Court: Exhibit T.

(The court file in Cause No. 4950, previously marked Plaintiffs' Identification 20, was received in evidence as Plaintiffs' Exhibit T.)

Mr. Taylor: If the Court please, I am going to re-offer 16 at this time.

The Court: Very well, you submit it to me. Now, Mr. Cole, do you realize what 16 is?

Mr. Cole: Yes, your Honor, and the defendant objects on [85] the same grounds urged yesterday, that it is hearsay. I don't know whether the person who certified that is the United States Marshal or whether he purports to be the United States Marshal or anything about it. Anybody could have made that certification.

The Court: I think the certificate is defective, and I think it covers more than should be covered by the certificate. It is under the seal of the Marshal, "I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Division, do hereby certify that the annexed record is a full, true, and correct copy of Page 225, of Civil Docket No. 10, Marshal's Docket No. 5185, Court No. 4950."

Now, the certificate as to which page was offered, admitted and marked, and so forth, that is all superfluous, but I don't see how it could be at all

(Testimony of Nick Kupoff.)

prejudicial, and I think it is a sufficiently sufficient certificate so that I will now admit it in evidence.

Clerk of Court: Exhibit U.

(The certified Marshal's docket sheet, Case No. 4950, previously marked Plaintiffs' Identification 16, was received in evidence as Plaintiffs' Exhibit U.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, you spoke yesterday in regard to what you did when you arrived at what you call the pay streak, and I am going to ask you: how far did you drive your drift into [86] the pay streak?

A. Well, I think it was 10 or 12 feet.

Q. And then you testified you opened up the face of it. What distance did you open up the face of it?

A. Well, I think I said thirty feet, but that was just for one side, thirty feet. It would be sixty feet if we figure both ways, branch out.

Q. In other words, you branched both ways when you hit there? A. That's right.

Q. And then from then on where did you mine from?

A. Well, we mined out the face, all along that face, you know.

Q. Now, Mr. Kupoff, do you know what the customary royalties were at that time for mining property?

Mr. Cole: It is immaterial, your Honor.

The Court: Sustained, Mr. Taylor.

(Testimony of Nick Kupoff.)

Mr. Taylor: I think it is very material in this case, your Honor.

The Court: The customary royalty?

Mr. Taylor: The customary royalties that the owner of a mining property gets from the——

The Court: Here you are proceeding on a lease, aren't you?

Mr. Taylor: Yes, sir. The customary royalties in the Fairbanks area that are paid to the owners of property by the [87] operators.

The Court: I am wondering what your theory is as to what is customary, when in this case you claim under a specific contract or lease.

Mr. Taylor: Thirty-three and one-third percent, yes, your Honor.

The Court: That is what you are claiming here.

Mr. Taylor: Yes, that's what it was. The lease said that.

The Court: Yes. Then, I don't see what materiality the customary lease has.

Mr. Taylor: I want to show that this is a variation from the custom, your Honor, and I would like to approach the bench to make an offer of proof.

The Court: You may make an offer of proof.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: We expect to prove by this witness, to show that at that time 12½ percent or 15 percent was the customary royalty paid by the operators to the owners, but that this property, by reason of its



(Testimony of Nick Kupoff.)

richness and the large sums that had been taken out of the pay streak by miners under leases prior to that time, they made the lease  $33\frac{1}{3}$  percent.

The Court: All right, Mr. Cole?

Mr. Cole: Your Honor, I think the custom is entirely irrelevant. I think by custom Mr. Taylor is attempting to show the value of or the purported value of this ground, and I don't [88] think that you can do indirectly in this manner what he is attempting to do in this way. I think custom is entirely irrelevant. If he can show the value of the ground, that is one thing, but he can't be allowed to show the alleged value of it by custom. There is no relevancy whatsoever.

Mr. Taylor: I think we can show that, your Honor, by reason of the fact that they paid such an excessive rent.

Mr. Cole: I would also like to say that the mere fact that the plaintiffs made a bad agreement, if they did, certainly has nothing to do with the value of the ground. It is totally irrelevant.

Mr. Taylor: But the value of the ground had something to do with the agreement, with the terms of the lease.

The Court: I can't see the theory of the plaintiffs, and I will sustain the objection.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

Q. (By Mr. Taylor): Now, Mr. Kupoff, when you opened up this face of the pay streak, did you

(Testimony of Nick Kupoff.)

test the full length of that face, which you testified was sixty feet?      A. Every few feet.

Q. And what would you say as to the values on the full length of the face, of the pay streak?

A. Well, it takes a lot of figuring, but I think I can [89] by what we get on the pan.

Mr. Cole: Excuse me, may I have that answer read, please?

The Witness: I say the whole thing takes a lot of figuring, you see, but the only way it is, we can take a pan out and pan it, and the value of gold we get, so that way we have to do lots of figuring.

Q. (By Mr. Taylor): So, then, every few feet you'd pan; is that right?      A. Sure, we did.

Q. When you were driving, removing the dirt as you went into the pay streak, did you do the same thing, follow the same procedure?

A. Yes, sir.

Q. So, then, did you have a pretty good record, then, of the values of all the dirt and gravel that you took out of the pay streak?

A. Yes, we depend on it pretty well. We depend on it.

Mr. Taylor: Could we have the recess, your Honor, now?

The Court: Yes. Members of the jury, please heed the admonition I have given to you previously, and we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

(Testimony of Nick Kupoff.)

Clerk of Court: Court is reconvened.

The Court: Unless the parties request the roll call of the [90] jury, I will assume at all times that you stipulate they are present.

Mr. Taylor: Yes, your Honor.

The Court: Very well. You may proceed.

Mr. Taylor: Will you take the stand again, Mr. Kupoff?

Q. (By Mr. Taylor): Now, Mr. Kupoff, Plaintiffs' Exhibit T is a file of the case that Mike Stepovich had against you and your partners. Now I want to ask you a few questions in regard to that. In the first cause of action it alleges that he rented to the partnership an RD-7 caterpillar with dozer at fifty dollars a day and that you owed him \$2,700.

Would you state to the Court and to the jury as to any dealings that you might have had with that particular caterpillar tractor?

A. No, sir, not——

Q. What?

A. Never used it and never had any dealing with it.

Q. And did you ever see that caterpillar tractor at the mine?      A. Yes, sir; it was there.

Q. And how long was it there after you got there?

A. I think it was a couple of months parked there and Cleary Hill Mining Company sent a couple men down there and take it out. It was somewhere in March. [91]

(Testimony of Nick Kupoff.)

Q. Did you rent, though, from Mr. Stepovich a tractor?      A. I did.

Q. What kind of a tractor was that?

A. That was a small 22 cat. It was on the lease.

Q. And that one, then, do you remember the rental for that cat?      A. Yes, sir.

Q. What was it?

A. It was \$500 for the period of the lease, in two payments \$250 each. We paid already in \$250 on coming year.

Q. And that was for the entire period of the lease?      A. Yes, sir.

Q. Now, in the second cause of action in this case, Nick, he accused you and your partners of being indebted to Shermer and Reed, doing business as Pioneer Express. Did you at any time give Mr. Stepovich authority to pay those bills?

A. No, sir.

Mr. Cole: It is irrelevant, your Honor, I think.

The Court: I will permit it to stand.

Q. (By Mr. Taylor): And had you paid on those bills, Mr. Kupoff?

A. Yes, I did pay every month. At the end of the month I paid.

Q. And then also in Count No. 3 it is alleged that you were indebted to Ferguson and Rutherford in the amount of \$18.60. [92]

Did you owe Ferguson and Rutherford that much money.      A. Eighteen dollars.

Q. \$18.60?

A. Something like that, yes.



(Testimony of Nick Kupoff.)

Q. And what was the status of your account with Ferguson and Rutherford?

A. Well, I always got the bill at the end of the month.

Q. And then would you pay them?

A. I'd come in and pay them. I don't think there is any check—I don't think you will find any check there because that is the only bill I ever charged there.

Q. Now, also there was an allegation in the fourth cause of action that you owed J. E. Barrack \$11 for merchandise. Did you owe Mr. Barrack that \$11?

A. That's right, \$11.

Q. And had you received a bill for that?

A. No, I didn't receive a bill yet.

Q. And, Mr. Kupoff, how were you paying Mr. Barrack for any purchases at his store?

A. Well, at the end of the month.

Q. And also in Count No. 5 he alleged that you were indebted to the Northern Commercial Company for \$387.99. Was the partnership indebted to the Northern Commercial Company in that amount?

A. Yes, we deal at the N. C. Company.

Q. And what was your arrangement, if any, with the N. C. [93] Company in regard to payment?

A. The same as the others, at the end of the month I get a bill and statement.

Q. Now, also Mr. Stepovich alleged in regard to the N. C. bill that—I will take that back. I'll have to correct that statement. I see in the next paragraph there was a balance at the N. C. of \$187.99

(Testimony of Nick Kupoff.)

and not \$387.99. You had paid the \$200, then, on the bill, had you?      A. I think that is correct.

Q. Now also in paragraph four of that cause of action, Mr. Stepovich alleged that the Northern Commercial Company had assigned that claim to him.

Would you state whether or not an assignment was ever made from the Northern Commercial Company to Mr. Stepovich?

Mr. Cole: I object, on the grounds that he should be first asked if he knows, your Honor.

The Court: Sustained.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): Do you know whether the Northern Commercial Company ever assigned their claim to Mr. Stepovich?

A. Yes, they signed to——

Q. I didn't get that.

A. N. C. Company assigned that bill to Mike.

Q. And did he pay the bill? [94]

A. I don't know.

Q. After this thing was over, did you have any dealing with the N. C. Company regarding this bill?

A. Well, they sent me a bill one time, a year later.

Q. Yes.

A. And they wanted me to pay the bill, so I went down and talked to Preston, the Manager, and he told me, he said——

(Testimony of Nick Kupoff.)

Mr. Cole: Your Honor, he is testifying to hear-say again.

The Court: Yes, sustained.

Mr. Taylor: Yes, you can't testify to that, Nick.

The Witness: And he told me, he said——

Mr. Taylor: Just a moment, Nick. The court upheld the objection.

The Witness: I better stop, then.

The Court: That's all right, Nick.

You are not permitted to tell what somebody else said.

Q. (By Mr. Taylor): So they billed you after this matter was over and tried to get you to pay the bill?

A. Yes, that's right.

Mr. Taylor: You may take the witness.

### Cross Examination

Q. (By Mr. Cole): What year did you first come to the United States, Nick? [95]

Mr. Taylor: We object as incompetent, irrelevant and immaterial to this case, your Honor.

The Court: It's preliminary. He may answer.

Mr. Taylor: It has no bearing upon this case.

The Court: That could only be told later. He may answer.

A. I came into the United States in 1915.

Q. (By Mr. Cole): Where did you go from there, after you first arrived in the United States?

A. I came to Seattle.

Q. And where did you go from there?

A. I come up here in Alaska.

(Testimony of Nick Kupoff.)

Mr. Taylor: Your Honor, I don't believe it is competent or relevant. It goes to prove none of the issues of the complaint.

The Court: It is preliminary. He may proceed.

Mr. Taylor: It is an unnecessary preliminary matter.

Q. (By Mr. Cole): What year did you get up here in Alaska? A. 1916.

Q. Where did you first go?

A. Anchorage.

Q. How long were you there?

A. Three years.

Q. And what did you do there?

A. I went back to States. [96]

Q. You went back to the United States——

A. United States.

Q. ——after you had spent three years in Anchorage? A. Yes, sir.

Q. Where did you go in the States?

A. Oh, I just worked out in the State of Washington.

Q. What doing? A. Oh——

Mr. Taylor: If the Court please, I am going to object. This is only taking up the Court's time and the jury's time, and I think it is incompetent, irrelevant and immaterial and is not proving anything.

The Court: He may proceed.

Q. (By Mr. Cole): You went back to the State of Washington, and what did you do back there, then?

A. Oh, I work on different jobs, construction.



(Testimony of Nick Kupoff.)

Q. How long were you in the State of Washington? A. Oh, up until 1932.

Q. And then where did you go from there?

A. I came up to Juneau.

Q. What did you do in Juneau?

A. Mining.

Q. What kind of mining did you do there?

A. Quartz mining.

Q. Gold mining? [97] A. Quartz mining.

Q. Quartz mining. Do you have reference to lode mining, hard-rock mining? A. That's it.

Q. And who did you work for there?

A. Well, they call it Alaska Juneau Mining Company.

Q. How long did you work for them?

A. Five years.

Q. Five years? A. Yes.

Q. And that would take you up to about 1937?

A. Yes.

Q. And what happened then?

A. Oh, I came up here.

Q. Did you come to Fairbanks?

A. Yes, sir.

Q. What did you do when you got up here to Fairbanks? A. Working in the mines.

Q. Where?

A. Out here, Sourdough Creek.

Q. Who did you work for out there?

A. Zimmerman.

Q. Zimmerman. How long did you work for him? A. About six or seven seasons.

(Testimony of Nick Kupoff.)

Q. Six or seven seasons from 1937; is that right?

A. That's right, spring of 1937.

Q. And for six seasons you worked for Zimmerman?  
A. Yes.

Q. Well, that would take you up to 1943; is that right?  
A. 1937 to 1942.

Q. Well, let's go back and go at it this way: Who did you work for in 1938?

Mr. Taylor: He thinks he better start all over, your Honor. We object to the re-hash of this, your Honor.

The Court: Overruled.

Q. (By Mr. Cole): Who did you work for in 1938, Nick?  
A. Zimmerman.

Q. Who did you work for in 1939?

A. Zimmerman.

Q. Mr. Zimmerman?  
A. Yes.

Q. Who did you work for in 1940?

A. 1940, I worked for Bartholomew outfit out here, Bartholomew Mining Company. I worked for old man Grant, old operation.

Q. In 1940?  
A. Yes.

Q. What did you do for those fellows?

A. What I do for them?

Q. I mean what type of work did you do? [99]

A. Mining—I drive a cat for Bartholomew, and hoisting and blacksmithing for old man Grant.

Q. When you worked for Bob Bartholomew you drove a cat, and then when you worked for Mr. Grant you did a little blacksmithing?

A. That's right.

(Testimony of Nick Kupoff.)

Q. That was in 1940. Now what about 1941, what did you do then?

A. Well, I—I don't know right now that summer. I think I was out here on the wood camp for a while.

Q. What did you do out there?

A. Cutting wood.

Q. Cutting wood, and then what about 1942?

A. Well, 1942, I was here and we got this lease off Mike and we went out to Fish Creek.

Q. Now, this hard-rock mining or lode mining that you did in Juneau, that's quite a bit different type of mining, isn't it, than the placer mining which you did at Fish Creek? A. Yes.

Q. Did you ever do an awful lot of panning there when you worked for Zimmerman, or did you just mostly do cat work?

A. No, I used to clean up for him and one thing and the other.

Q. Just general labor?

A. Yes, all around. [100]

Q. Now, then when you got out to the mine, after you got the drift cleaned out and started mining operations—after you got the drift cleaned out, you immediately commenced mining operations; is that right?

A. Well, it wasn't real operations. It was driving a tunnel.

Q. Well, what did you do with the gravel that you got?

(Testimony of Nick Kupoff.)

A. We take it out and sluice it through the sluice boxes.

Q. That is mining, isn't it?

A. Well, in a way.

Q. How else do you mine, if it wasn't mining?

A. That is what we call dead work in mining. Until you really start operations, that's dead work.

Q. Weren't you operating then, or what were you doing?

A. Sure, we was driving tunnel and take out dirt and——

Q. And sluicing it? A. Yes.

Q. And you sluiced it to recover the gold from it? A. That's right.

Q. Now, you had a clean-up in June; is that right?

A. Yes, somewhere around there. I couldn't tell you the exact date.

Q. Well, your exhibit, which you identified, shows you had a clean-up on June 2nd, 1942; is that right? A. That's right. [101]

Q. When did you have the next one?

A. Well, I couldn't date it.

Mr. Taylor: Instead of asking him a question, why doesn't he show him the exhibit?

The Court: He has the right to ask if he recalls.

The Witness: I couldn't remember the exact date. It should be somewhere around tenth of August.

Q. (By Mr. Cole): Did you have any around June? Did you have another clean-up in June?



(Testimony of Nick Kupoff.)

A. No, not two clean-ups in June.

Q. Just one clean-up in June? A. Yes.

Q. I hand you Plaintiffs' Exhibit S, which is a bank deposit book, and ask you to observe it, please.

A. Well, that could be in June. We would have a clean-up within ten, fifteen or twenty days, I wouldn't have time to come to town. I would be busy, so these dates could be wrong, as far as I am concerned.

Q. What do they show there?

A. Well, let's see what they show—two clean-ups in June, well, June 2 and June 16.

Q. Does it show a clean-up on June 16th?

A. Yes, June 2nd and June 16th, that is the deposit there. It doesn't mean that we have done it.

Q. It probably indicates you had another clean-up in June; is that right?

A. Well, according to the book it is two clean-ups in June, but I really can't figure out how that come out.

Q. You identified the exhibit yesterday as——

Mr. Taylor: Your Honor, I believe it is improper cross examination. The exhibit speaks for itself.

The Court: Well, counsel has a right to inquire about the exhibit of the witness.

Q. (By Mr. Cole): Didn't you say yesterday that that book, which is the Plaintiffs' Exhibit S, showed a clean-up, or indicated the deposits of clean-ups?

You can just answer yes or no.

(Testimony of Nick Kupoff.)

A. Oh, yes, I did. It shows two clean-ups, there.

Q. Well, did you have two clean-ups in June, or didn't you?

Mr. Taylor: The record speaks for itself, your Honor. I think he has answered the question.

The Court: Objection overruled. He may answer the question if he can.

The Witness: Are you waiting for me?

Mr. Cole: Pardon?

The Witness: Are you waiting for me to answer?

Q. (By Mr. Cole): Yes. Did you have two clean-ups in June, or didn't [103] you?

Mr. Taylor: Just a moment. I would like to have the question re-read.

Mr. Cole: I asked Mr. Kupoff——

Mr. Taylor: I am asking to have it re-read.

The Court: Gentlemen, I will have the question read to the witness and have the witness answer it, and we will proceed.

(Thereupon the reporter read the last question.)

A. Well, I have one clean-up. I can't remember the other.

Q. (By Mr. Cole): What did these premises look like out there when you first got out there? Were there any buildings on the ground?

A. Yes.

Q. Where were they with reference to the shaft?

A. There was some up the hill maybe five or six hundred feet and cabins. The boiler house was close to the shaft.

(Testimony of Nick Kupoff.)

Q. You had a boiler house next to the shaft?

A. That's right.

Q. And did you have any other buildings in that immediate vicinity?

A. Well, there was an old building there supposed to be tools house. I didn't even know what was there. I never opened it.

Q. Was there any wood around the boiler house? [104] A. No.

Q. No wood there. What else was on the property in this immediate vicinity?

A. Well, there was boxes, sluice boxes there, part of the pipeline was there from the ditch.

Q. And was there a gin pole there?

A. Yes.

Q. And what is a gin pole?

A. Gin pole is where you connect your cable to the shaft and carry your gravel out to the boxes, the gravel that comes out of the mine.

Q. So you have a winch going down the shaft, a cable connected to a winch, that goes down the shaft, and the winch hauls the gravel and the bucket up from the shaft and carries it along the line to the gin pole? A. That's right.

Q. And then when the bucket gets up near the gin pole there is a strip which drops the——

Mr. Taylor: Just a moment. Your Honor, I believe the witness should testify in this matter, not Mr. Cole.

The Court: This is cross examination and I see nothing wrong with it so far. He may answer.

(Testimony of Nick Kupoff.)

Q. (By Mr. Cole): —and then there is this bucket which travels up this line connected to the gin pole, the top of the gin pole, and the [105] bucket gets up near the gin pole and there is a little trip and it trips the bucket, and it dumps the ore?

A. That's right.

Q. And where were these sluice boxes located with reference to the gin pole?

A. They were located between the gin pole and the shaft.

Q. Did you dump the ore or gravel near those boxes?

A. Well, pay gravel, we dump right on top of it.

Q. Why didn't it clog the boxes?

A. We have them covered.

Q. How do you cover them up?

A. With laggings, board, whatever is necessary.

Q. So the ore travels this bucket up towards the gin pole and it is tripped and it is dumped down into a pile, the pay dirt, on top of the sluice boxes, and the sluice boxes are covered with some logs; is that right?      A. Yes.

Q. How do you get the gravel into the sluice boxes?

A. Well, we put the water in the boxes and we take one board or log, whatever it happens to be, and a few gravels slide down, and when that run out you take another piece of board or log.

Q. How long are these logs?

A. It depends on whatever your box is.

Q. How long were the logs you used out there?



(Testimony of Nick Kupoff.)

A. Four feet.

Q. About four feet?

A. Four feet, six feet.

Q. And how big in diameter are they, roughly?

A. Three or four inches.

Q. And, now, when you start clearing this ore from——

Mr. Taylor: Just a moment. Your Honor, I think Mr. Cole is confused. This is not a quartz mine. This is a placer mine. The reference to "ore" is ill advised.

The Court: The witness can handle that situation, I think.

Q. (By Mr. Cole): Excuse me. When I have reference to "ore," I am referring to the pay dirt which you have taken out of the mine. Do you understand me?

A. "Ore," that's rock mine, they call it "ore." We call it pay dirt or gravel.

Q. How do you get this gravel or ore or pay dirt into the boxes when you have the logs there? You start removing the logs; is that right; and then the gravel slides down into the boxes, and you turn on the water; is that right?

A. That's right.

Q. And the water carries this gravel down into the boxes; is that right? A. That's right.

Q. And the gold, because it is heavier than the other part [107] of the ore, sinks to the bottom; is that right? A. That's right.

(Testimony of Nick Kupoff.)

Q. And that is the way you separate the gold from the rest of the ore; is that right?

A. That's right.

Q. O. K. Now, when you start to do that, where do you start on the sluice boxes? Do you start at the upper end or at the lower end, slide in from the lower end of the box?

A. Lower end.

Q. You start from the lower end of the box. I see.

Mr. Taylor: I didn't get that question.

The Court: Do you want to have it read?

Mr. Taylor: Would the Court have the reporter read that last question?

The Court: Yes, sir.

(Thereupon the reporter read the last question.)

Mr. Taylor: And what was the question prior to that?

(Thereupon the reporter read the second and third to the last questions.)

Mr. Taylor: Now, from then on, I move it be stricken because it is so indefinite, your Honor, that neither the jury nor I can understand what he means. He said, "when you do that." I don't know what he was referring to by "that." Mr. Cole possibly should make himself a little clearer.

Mr. Cole: I will be happy to do that. [108]

The Court: Very well. Proceed.

Q. (By Mr. Cole): Starting back again, after the ore or gravel is taken from the mine and

(Testimony of Nick Kupoff.)

dumped on top of the sluice boxes, which are covered with logs between three inches in diameter and four inches in diameter and between four and six feet long, and you decide to sluice the gravel, you begin removing the logs from the lower end of the——

Mr. Taylor: Just a moment. Your Honor, I am going to interrupt again and object to the witness, or pardon me for calling you a witness, Mr. Cole, stating that they cover the sluice boxes with the gravel. I would like to know whether all the sluice boxes or part of them or one end of them. It is so indefinite, your Honor, that I can't follow it. I have placer mined myself, and I can't follow it.

The Court: I see no difficulty. Counsel may proceed and if a question is put to the witness that the witness doesn't understand, we don't expect him to answer the question. I think he has shown good intelligence so far.

Mr. Cole: Yes.

Q. (By Mr. Cole): When you decide to sluice this gravel that you piled out there, you begin removing these logs from that part of the pile which lies closest to the lower end of the sluice box?

Mr. Taylor: Now, just a moment. Your Honor, I am going to [109] object, as it is a misstatement of the method of placer mining. He piled nothing toward the lower end of the sluice box, your Honor. I think he better find out where he is piling his dirt before he does that.

(Testimony of Nick Kupoff.)

The Court: Well, the objection, if it is one, is overruled and we will attempt to proceed.

Mr. Cole: If the Court please, there has been nothing improper with these questions and it's just confusing the whole thing by Mr. Taylor continually making these spurious objections. I wish the Court would admonish him.

The Court: He is entitled to make his objections, but I would like to have the objections concise and to the point, and I will rule and we will proceed in that manner.

Q. (By Mr. Cole): Now, I hate to start back again but have we got it clear that you remove these logs from the lower end of the dump when you begin to sluice? A. Yes.

Q. And then you turn on the water and the gravel is pushed down the sluice boxes and the gold sinks into the box beneath and the debris is carried on out beyond the sluice boxes and you recover the gold; is that right? A. That's right.

Q. That is the way you placer mined out there in your operation; is that right? [110]

A. Yes, sir.

Q. Is that the type of operation which you used when you had your clean-up there in June?

A. Yes.

Q. I suppose with all later clean-ups you did the same thing? A. The same thing.

Q. The same general practice. In this clean-up in June, June 2nd, as you remember it, about how many cubic yards of gravel did you put through?



(Testimony of Nick Kupoff.)

A. Well, that is pretty hard to tell. You don't measure, how are you going to figure?

Q. Can you make an estimate?

A. Well——

Q. Between, say, four and five hundred yards?

A. It is pretty hard to estimate when you take a few buckets a day and sluice it, without paying any attention.

Q. Do you have any idea how many yards you put through?

A. I would say one hundred, two hundred.

Q. One hundred to two hundred?

A. One hundred to two hundred, I can't be——

Q. What about your clean-up that you had there a little later on in June, which is reflected in that exhibit? About how many yards did you put through then?

A. That would be on the same basis as the other. I have no [111] idea of the yardage.

Q. You don't have any idea.

The Court: No idea of the yardage?

The Witness: That's right.

The Court: Thank you.

Q. (By Mr. Cole): Now, then, I suppose you were just continuing mining operations after that last clean-up which is reflected there right on through until the time the Marshal came out; is that right? A. Yes.

Q. Did you have any gravel up there in the dump when he came out? A. Oh, yes.

(Testimony of Nick Kupoff.)

Q. And how much do you suppose you had dug out there?

A. Well, I think we dug out quite a bit then. We sluiced quite a bit, and I think it was somewhere around two to three hundred yards, maybe a little less, maybe more, because we sluiced a little bit every day.

Q. Now, four or five hundred—excuse me, now, you say between three and four hundred yards, it might have been a little more and it might have been a little less? A. That's right.

Q. You had out there on that dump when the Marshal came out; you never got to wash that up?

A. No, sir. [112]

Q. What did that pile look like—that dump?

A. It's like any other gravel pile, it's piled, dumped. You can't see no gold.

Q. Was it on the uphill side or the downhill side of the gin pole?

A. Down towards the creek.

Q. And you had these logs covering it up?

A. Logs covered the box, yes.

Q. And you had a little dump on top of those logs? A. Yes.

Q. And you cleaned up some of that earlier and you had sluiced some of it—I'm sorry, you sluiced some of it? A. That's right.

Q. And that dump which is out there had the pay in it; is that right? A. Yes.

Q. That's when you were mining right in this thirty-foot or sixty-foot streak?

(Testimony of Nick Kupoff.)

A. That's right.

Q. And that was the richest pay you found out there?

A. That's right. Can I explain a little point on that dump business?

The Court: I think it would be proper.

The Witness: He said four to six feet logs. That wouldn't hold much gravel, but the dump might be fifty feet wide in the [113] bottom, build up, and your boxes go under, and the logs was just covering the boxes. It had nothing to do with the pile. The pile is big. Sometimes it's hundred feet in diameter in the bottom in the gravel dump.

Q. (By Mr. Cole): How long was that pile? I mean, do you have any idea about how long it was?

The Court: Are you talking about the pile that was there when the Marshal came?

Mr. Cole: Yes. The pile which you left when the Marshal came out.

The Witness: Oh, I would say thirty feet, but down in the base, the bottom, I would say it is forty feet.

Q. (By Mr. Cole): About forty feet long?

A. Yes, forty feet in diameter in the bottom, and we set the boxes there, and your box is off the ground, gravel naturally runs on each side and the end and in the middle somewhere pile up with rocks.

Q. About how high was it?

(Testimony of Nick Kupoff.)

A. Oh, I would say maybe fifteen, twenty feet high, maybe.

Clerk of Court: Defendant's Identification A.

(The picture of dump at mine was marked Defendant's Identification A.) [114]

Q. (By Mr. Cole): I hand you Defendant's Identification A, Mr. Kupoff, and ask you to look at it, please.

Have you observed it?

A. I see the gin pole and rock pile there.

Q. Is this picture of the scene out there as you left it, showing the sluice boxes here, except for this brush here?

Mr. Taylor: We object to that, your Honor.

The Witness: No.

Mr. Taylor: Just a moment. We are going to object to the question——

Mr. Cole: Well——

The Witness: It don't look like——

Mr. Taylor: ——on the ground that the picture is not identified.

The Court: He is asking the question and he said, "No."

The Witness: I can't say I recognize that picture. There is a gin pole there and gravel——

Q. (By Mr. Cole): Is that the gin pole which you had?      A. I don't know.

Q. Is that the sluice boxes which were there?

A. Well, I don't know. I couldn't tell you. There are thousands of gin poles and sluice boxes. I can't recognize it.



(Testimony of Nick Kupoff.)

Q. Now, in the earlier trial of this case, Mr. Kupoff, while under oath—— [115]

Mr. Taylor: What page?

Mr. Cole: Page 57 of the printed transcript.

Mr. Taylor: If the Court please, I move that we take the usual recess.

The Court: What time do you have, Mr. Hall?

Clerk of Court: It's just twelve o'clock, your Honor.

The Court: Members of the jury, please heed the admonition I have previously given to you, and this case will be continued at two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

2:00 p.m.

Clerk of Court: Court has reconvened.

The Court: Are the parties and counsel ready to proceed?

Mr. Cole: The defendant is ready, your Honor.

Mr. Taylor: The plaintiffs are ready, your Honor.

The Court: Very well.

Mr. Taylor: We will stipulate as to the presence of the jury and the alternate juror, your Honor. They are all in the box.

The Court: Very well.

Mr. Taylor: May I be excused a moment to get my file, your Honor?

The Court: Certainly.

Mr. Cole, I believe you were engaged in cross-examination.

Mr. Cole: That is correct, your Honor.

The Court: You may proceed. [116]

### NICK KUPOFF

the witness on the stand at the time of taking the noon recess, resumed the stand for

#### Further Cross Examination

Q. (By Mr. Cole): Now, these clean-ups you had there in June, how much gravel did you put through, about, each time?

A. Well, you asked me the same question before. I don't know. I have no idea.

Q. Have you ever said that you put about three or four hundred yards through at each clean-up?

A. It might be three or four hundred yards.

Q. Do you suppose that's about how much you put through on each clean-up—three or four hundred yards?      A. It could be.

Q. If you said that on a previous occasion while under oath, it probably would be true, wouldn't it?

Mr. Taylor: Just a moment. Could I ask the counsel what page in the attorney's transcript that that appears on?

The Court: He didn't say it appeared in the transcript yet.

Mr. Taylor: I see.

Mr. Cole: Would the reporter please read the question to the witness?

(Testimony of Nick Kupoff.)

(Thereupon the reporter read the last question.)

Mr. Taylor: We object to the question, your Honor, upon the [117] ground that there is no showing that he made such a statement.

The Court: I am going to sustain the objection.

Q. (By Mr. Cole): Do you have any recollection of ever saying that under oath?

A. No. I might have, but I don't remember whether I did or not.

Q. Well, let's put it this way, then: if you have ever said that before, do you suppose it would be true?

Mr. Taylor: Just a moment. Your Honor, I am going to object to that question. Don't answer, Mr. Kupoff. I think the question is improperly framed, your Honor, and I think he must show that at such and such a time he made the statement.

The Court: Well, he is trying to lay the foundation for putting a specific question, I believe, and he may answer.

A. Well, I couldn't say yes or no.

Q. (By Mr. Cole): You just don't remember?

A. No, I don't remember whether I did or not.

Q. Don't you remember this mining operation that you are testifying about in this lawsuit?

A. I think I do.

Q. But you just don't happen to remember how much gravel you put through there?

A. That's right.

(Testimony of Nick Kupoff.)

Q. When you were getting into this so-called rich pay and [118] you were panning it, how did you pan it?

A. Well, we take dirt out of the face and shake it up and pan it, just usual panning.

Q. How do you pan gold?

A. You put it in a pan and use your water and shake it until you get your dirt out.

Q. You get the dirt out, and then what do you do?

A. Leave the gold in the pan.

Q. Then the gold remains in the pan?

A. Yes, sir.

Q. Then how do you know how much gold you have in there? Just say, "Well, that's about a dollar's worth," is that it?

A. Yes, that's—when you do so much panning, why, you use judgment.

Q. O.K. Now, this operation out there, how much did you say your total expenses were for that summer?

A. Well, it shows in the papers black and white, but I think somewhere around six, seven thousand dollars.

Mr. Cole: I have no further questions, your Honor.

Mr. Taylor: If the Court please, I have a question which I overlooked asking this morning, which I would like permission to ask. It is in the line of our direct-examination.



(Testimony of Nick Kupoff.)

Mr. Cole: I am going to object to anything that isn't proper re-direct-examination.

The Court: I have no idea what you wish to go into. Maybe you should approach the bench and tell me what you wish [119] to pursue.

(Thereupon counsel approached the bench, and the following ensued out of the hearing of the jury):

Mr. Taylor: When I got to the end of my testimony I had still left him at the mine and I had overlooked the fact as to what transpired after he left the mine, your Honor, and the condition of the place.

The Court: Well, what do you wish to go into now?

Mr. Taylor: As to when they left the mine, what happened then and why, and if they ever went back and resumed operations. I did not touch upon it. I think it is important that that be done.

The Court: I will give Mr. Cole an opportunity to make a reply on the record.

Mr. Cole: I think that Mr. Taylor was given a full opportunity to present his direct testimony before the witness was subjected to cross-examination, and I think that Mr. Taylor has stated no reasons, sufficient reasons, why he should now exceed the scope of cross-examination. I think it puts the cross-examiner at a disadvantage because the cross-examiner frames his questions with this limitation of the redirect-examination in mind, and

(Testimony of Nick Kupoff.)

then to give the direct-examiner an opportunity to go into direct-examination again is prejudicial to the defendant.

The Court: Well, I am inclined to be liberal about this, but I would like to have you tell me, Mr. Taylor, a little more [120] specifically——

Mr. Taylor: Here is the thing: everything was attached, the grub, the oil and fuel and everything. They were not able to stay there. They had to go.

The Court: What line of questioning do you wish to go into now that you overlooked on your direct-examination?

Mr. Taylor: I still left him at the place. I want to bring him back, and to see if Nick went back, what became of all their goods that were attached at the time when Mr. Stepovich attached their stuff and threw them off; if they went back and got any of that.

Mr. Cole: I am prepared to stipulate to that but I think that——

Mr. Taylor: He has the right to cross-examine when I get through.

The Court: There is no doubt about that.

Mr. Taylor: I had several matters. I had some notes that my son should be here with in a minute.

Mr. Cole: I think that the Court has been exceedingly liberal with Mr. Taylor in allowing this testimony and an opportunity to confer with his witnesses and that Mr. Taylor has other witnesses by which he can introduce this same evidence.

(Testimony of Nick Kupoff.)

The Court: Well, I don't quite understand what Mr. Taylor wants to go into. He says his son will be back soon with some notes. He is not here now. Here he comes now. I would like to know what you wish to develop. [121]

Mr. Taylor: Well, I would like to know what became of the groceries, the oil, the fuel, the shovels, the rails, and other matters in there that they had purchased, if they were ever able to retrieve them, and if they went back, and if not, why not, after the case was dismissed, the case of Stepovich versus these plaintiffs. I think it is very important.

The Court: I will permit you to re-open the direct-examination for the purpose stated.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

The Court: At this time I am permitting Mr. Taylor to go into some matters that he says he overlooked on his direct-examination.

Direct Examination—(Continued)

Q. (By Mr. Taylor): Mr. Kupoff, after you were ejected from the claim by the United States Marshal—

Mr. Cole: I object to that. There is no testimony that he has ever been ejected by the Marshal.

Mr. Taylor: Your Honor, it's right in the return of the United States Marshal, which is in evidence here, that they did. They were ordered off by the United States Marshal.

(Testimony of Nick Kupoff.)

The Court: Is your objection to the word "ejected"?

Mr. Cole: Yes, your Honor. We stipulated the Marshal went out and attached certain properties, but there is certainly no [122] evidence that he ejected them.

Mr. Taylor: I will change the wording.

The Court: Very well.

Q. (By Mr. Taylor): Then, Mr. Kupoff, after you were thrown off of the property by Mr. Stepovich, did you ever go back? A. I never did.

Q. And what became of the groceries, the oil, the fuel and the shovels and other materials that you had bought for the operation of the mine?

A. As far as I know, they might be laying there yet.

Q. The record shows here, or the evidence shows that the case of Stepovich against you and your partners was dismissed on November 24, 1942. Would you state to the Court and to the jury why you did not go back at that time?

A. Well, it got cold and the mine was full of water and I thought it was going to cost me another four or five months to clean it, so my attorney advised me to ask Mike Stepovich if he will clean it.

Mr. Cole: Your Honor, I object to that and ask it be stricken, what his attorney advised him.

The Court: The motion is granted, and that portion shall be stricken and the jury will disregard what the witness said he was advised.

Mr. Taylor: Now—— [123]



(Testimony of Nick Kupoff.)

Mr. Cole: May I have that answer read?

The Court: Certainly.

(Thereupon the reporter read the last answer.)

Mr. Taylor: That part regarding what the attorney said is stricken, then, your Honor; is that it?

The Court: That's right.

Q. (By Mr. Taylor): Now, regarding that royalty of 33½ per cent, Mr. Kupoff, would you state to the Court and to the jury why you agreed to pay one-third of the value of gold taken out?

Mr. Cole: And the defendant objects to that, too. It is in the lease, what they agreed, and the reasons why make no difference.

The Court: I can't see the materiality of that, why the witness should be able to testify why he entered into that agreement.

I will sustain the objection.

Q. (By Mr. Taylor): Mr. Kupoff, have you had leases of mining property before that and since that? A. Yes.

Q. And are you familiar with the royalties that have been agreed upon in Fairbanks for placer mining operations, underground mining? Just answer yes or no. A. Yes. [124]

Q. And do you know upon what they base the royalties that are paid by the operators?

Mr. Cole: I object to that again, your Honor, on the ground that it is irrelevant what people do around here in their mining.

The Court: Sustained.

(Testimony of Nick Kupoff.)

Q. (By Mr. Taylor): Mr. Kupoff, at the time that you entered into this lease, state what knowledge you had of the richness or poverty of that claim?

Mr. Cole: I think that there are great hearsay dangers in the answer which that question calls for, and I think it is improper, and I object to it on that ground.

The Court: I believe so, too, Mr. Taylor, and I also believe that this is going clear beyond what you wished to go into on redirect-examination.

Mr. Taylor: If the Court please, I also intended this morning, for the purpose of illustrating to the jury, to have a plat of the underground workings here, which I would like to have Mr. Kupoff examine and use for illustrative purposes and they are on approximately the same distances as was——

The Court: In my statement, I am not urging counsel for defendant to consent to anything, but I would like to have him examine it and see whether or not it contains anything that is objectionable to its use for illustrative purposes. I am a great [125] believer in charts that will assist the jury, but of course there must be a proper foundation laid for them if they are to be received in evidence.

Mr. Cole: Your Honor, I would be happy to stipulate to the admission of this proposed——

Mr. Taylor: I don't believe it has been marked.

Mr. Cole: ——proposed identification, if I knew

(Testimony of Nick Kupoff.)

that it represents accurately what it purports to represent, but I honestly don't know.

The Court: I will require counsel to lay the foundation.

Mr. Taylor: Yes. Mr. Kupoff, I will have you take a look.

The Court: You might have that identified.

Mr. Taylor: For identification.

Clerk of Court: Plaintiff's Identification 23. The first 23 was withdrawn.

(Large plat purporting to represent the claim and underground workings was marked Plaintiffs' Identification No. 23.)

Q. (By Mr. Taylor): Now I want you to examine Plaintiffs' Identification No. 23 and state from your knowledge if that is a fair representation of the underground workings of the Eastern Star Claim as it was at the time that this dispute arose?

A. Yes, this is true sketch or drawing, whatever you want to call it, lines of the claim out here and how far we were to the boundary and shafts being worked out and tunnels being worked out. [126]

Q. What would you say as to its being, for illustrative purposes, is that about the way it was under the ground?

A. Yes, that is pretty well lined out.

Q. This is just preliminary, your Honor. I believe you testified that from the shaft one way went a drift which was not used; is that right?

A. That's right.

(Testimony of Nick Kupoff.)

Q. And then when you got over to where there was a turn in the drift, that there was another drift over there that was not used; is that right?

A. That's right.

Q. And that is shown by broken lines; is that right?      A. That's right.

Q. And I believe you testified when you got to here you made a drift that way (indicating), which was not used or mined; is that right?

A. That's right.

Q. And that is shown there with broken lines.

A. Yes.

Mr. Taylor: So, then, the broken lines would show the unused drifts and the blank lines would be the drifts that were used.

Mr. Cole: There is no objection insofar as the underground workings are concerned, but this proposed identification purports to show distances from base lines to the edge of the claim, and angles, and so forth. I don't see anything particularly damaging [127] about it. I will stipulate to its admission.

The Court: Mr. Taylor, I know Mr. Cole has stipulated to its admission, but you don't offer it, do you, for exact measurements or directions?

Mr. Taylor: No, just for the purpose of illustration, your Honor. I asked him if that is approximately the underground workings.

The Court: The object is to give the jury a general picture of the underground workings?



(Testimony of Nick Kupoff.)

Mr. Taylor: That is right, yes, sir.

The Court: But the jury is to understand that the distances and the directions are not definitely accurate.

Mr. Cole: I would also like to have the Court instruct the jury in addition to the fact that there has been no testimony that those distances and angles on there are true, it is purely speculative whether it is 100 feet or 200 feet, and also it states on there that it has been prepared from a sketch made by Joseph Ulmer, or Joe Ulmer, which the Court has excluded from evidence, and I think the Court should instruct the jury to disregard that, too.

Mr. Taylor: The reason we did it this way, your Honor, was because the Court, I believe, excluded this because there were writings on there that the Court felt were not admissible in evidence. We have excluded those writings but we have shown that the distances and the courses were taken from a survey by a [128] registered surveyor.

The Court: I want the jury to understand that Plaintiffs' Identification 23 is received for the purpose of illustration, only, and to give the jury a little better picture of the underground workings of the mine and that the distances and measurements set forth there are not accurate measurements—there has been no testimony as to them—and then I ask the jury to disregard the note at the bottom that this drawing is a copy of a sketch

(Testimony of Nick Kupoff.)

signed by Joseph Ulmer, because it is not necessarily such a copy.

Mr. Cole: Yes, your Honor, I am stipulating that it may be admitted because this witness has testified those markings and solid lines and dotted markings represent truly and accurately the general nature of the underlying drifts which they worked or which had been previously worked out.

The Court: Is that satisfactory?

Mr. Taylor: That is correct, your Honor.

The Court: That is satisfactory. It is now received in evidence for the qualified admission.

Clerk of Court: Exhibit V.

(The large plat of claim and underground workings, previously marked Plaintiffs' Identification 23, was received in evidence as Plaintiffs' Exhibit V.)

Mr. Taylor: I would like to have this marked for identification also.

Clerk of Court: Plaintiffs' Identification No. 24.

(Large plat of underground workings was marked Plaintiffs' Identification No. 24.)

Mr. Taylor: I would like to show this to Mr. Cole. That is a map. There are no distances or no directions on there, just to show an above view as to the workings there.

Mr. Cole: Yes, I will stipulate to the admission into evidence of Plaintiffs' Identification No. 24.

The Court: It will be received.

Clerk of Court: Exhibit W.

(Large plat of above view of underground

(Testimony of Nick Kupoff.)

workings previously marked Plaintiffs' Identification No. 24 was received in evidence as Plaintiffs' Exhibit W.)

Mr. Taylor: I believe that is all, your Honor.

The Court: Mr. Cole, do you desire any cross-examination?

Cross Examination

Q. (By Mr. Cole): In your drifting out there, Nick, did you do much pumping?

A. I pump water, yes.

Q. How long did you say it took you to clean out that drift there when you first went out?

Mr. Taylor: Just a moment. Just a moment. Your Honor, this is improper cross-examination. I think that counsel can only examine upon matters that were brought out on redirect-examination.

The Court: That is certainly true technically, but I haven't [130] been very technical so far in my rulings.

Mr. Cole: I think it is proper recross-examination, because the witness testified that it would take him six months to clean it out again.

The Court: You may proceed.

Q. (By Mr. Cole): How long did you say it took you to clean it out the first time?

A. I didn't say six months. I said three or four months.

Mr. Cole: That is all.

Mr. Taylor: That is all.

(Witness excused.) [131]

Mr. Taylor: Call Mr. Zukoev.

JAMES ZUKOEV

one of the plaintiffs, took the stand in his own behalf, and after being duly sworn testified as follows:

Direct Examination

Q. (By Mr. Taylor): Will you state for the record your name?

A. Jimmy—James Zukoev.

Q. Where do you reside, Mr. Zukoev?

A. 646 Fifth Avenue, Fairbanks.

Q. And how long have you resided in Fairbanks or the Fairbanks district?

A. It will be forty-four years in February.

Q. And what occupation have you followed since you have been in the Fairbanks area?

A. Mostly mining.

Q. Where did you live prior to coming to Fairbanks?      A. Where did I live?

Q. Yes.      A. I lived in 17th Street—

Q. Where?

A. When did I come first to Fairbanks?

Q. Yes, when you came to Alaska, where did you come from?

A. I come from, originally I come from San Francisco to Seattle. Then from there to Juneau, Alaska.

Q. And what did you do at Juneau? [132]

A. I couldn't do anything. I was too young and couldn't get a job under the ground.

Q. When did you first start to follow mining?



(Testimony of James Zukoev.)

A. I worked for some mines at Chatanika, I believe it was 1916 or 17—I think it was '16, not underground but work on top hauling wood for the hoist men.

Q. Where was that?

A. Chatanika, Alaska, Chatanika Creek, thirty miles from here.

Q. From here? A. Yes.

Q. And since that time have you been engaged in mining in this district? A. Yes, I did.

Q. And what kind of mining have you followed?

A. Well, I follow placer until 1939, then I started to quartz mine out at Happy Creek.

Q. What year? A. Happy Creek.

Q. What year was that? A. 1939.

Q. 1929? A. 1939.

Q. 1939. And how long did you stay out at Happy Creek? A. I stayed there one year.

Q. And you then later became one of the partners with Mr. Kupoff and Mr. Drazenovich in the lease upon Mike Stepovich's ground?

A. Yes, that's right.

Q. Had you ever been on that ground prior to the time that you and Mr. Kupoff secured the lease on it?

A. Well, I worked two different times to Mike Stepovich. I was there before it got leased.

Q. And was that on the same claim, on the Eastern Star claim?

A. Yes, that's the same claim.

Q. How long did you work there, Mr. Zukoev?

(Testimony of James Zukoev.)

A. First when I went out there to work, I worked I think either it was three months or four months.

Q. Do you remember what year that was?

A. It was 1936, if I am not mistaken.

Q. Was that altogether you worked about three months?

A. No, that's the first year I went out and worked for him.

Q. And then when did you again work for him?

A. I worked for him in 1941.

Q. And whereabouts did you work for him at that time?

A. That same claim, the same shaft we were working.

Q. Yes, now——

The Court: You might show how long he worked that time.

Q. (By Mr. Taylor): How long did you work that time, Jimmy? [134]

A. I believe I start tenth of April and worked there until fifth of October, until he closed down the mine.

Q. What was the date of the starting?

A. Tenth April, I believe.

Q. And now while you were working there in 1937, just what were your duties?

A. Well, I was wheeling dirt.

The Court: Excuse me. Was it in 1937?

The Witness: 1936.

Mr. Taylor: 1936, yes, pardon me.

(Testimony of James Zukoev.)

Q. (By Mr. Taylor): You were wheeling dirt?

A. That's right.

Q. Where would you wheel the dirt from and where to?

A. Well, we was driving the tunnel down to the old work, and then we take that dirt out from the tunnel, wheel it to the shaft, and dump it to the bucket, then the hoist men take it out.

Q. Did you use that method of mining all the time you worked there, wheeling? A. Yes.

Q. And when you were there in 1936, Mr. Zukoev, did you have anything to do with the cleaning up of the gold?

A. No, that was wintertime. We couldn't clean any gold then.

Q. Did you work there at any time during the clean-up? [135]

A. Yes, I did in 1941, all summer.

Q. And did you assist in any of the clean-ups?

A. Yes, I did.

Q. And did you do any of the panning in the drifts, Mr. Zukoev? A. Not at that time.

Q. What, if anything, did you do at the clean-ups?

A. Well, we had, whatever you call it, paddles. After we take the raffles out, we take all the gravel from the head of the box, the head of the box, and then we turn a little water and we have paddles about four feet long and four inches wide to the end, and we keep the gravel spaded out so the gravel keep on going and the gold stay behind, and

(Testimony of James Zukoev.)

Mike Stepovich was head of the box, with a little copper scoop, and whisk broom and couple pans here — a couple of whiskbrooms and pans, and he take the gold, what was left clean back, and we keep on going that way until we come to the end of the boxes.

Q. What was the nature of the gold as to size of the various pieces?

A. Well, at time that clean-up was there, I see some nuggets was just about walnut size, and some smaller.

Q. About the size of a walnut?      A. Yes.

Q. Was that true in 1941, too, Mr. Zukoev?

A. That's right. [136]

Q. At the time that you and Mr. Kupoff and Mr. Drazenovich negotiated the lease with Mr. Stepovich, were you acquainted with that ground?

A. Yes, I did.

Q. And did you have any objections to paying the royalty of thirty-three percent?

A. No, I haven't.

Q. Now, after you signed the lease, that is, you and Nick and Paul, how long afterwards did you go to the mine?

A. Well, we have to buy some rails, we went up to Ester Creek and buy rails from Nick Borovich, and we have to drop those from the tunnel out, take them out from the tunnel, then we have to drop them down to Marios. Then we have to hire the truck and bring it to town. It takes us from the 14th to 22nd of February.



(Testimony of James Zukoev.)

Q. So at that time you were assembling the things that you were going to take to the mine?

A. That's right.

Q. Then on the 22nd you say you went to the creeks?

A. Yes, we did.

Q. How did you get out there?

A. Well, we get out with Maxie Miller had one truck and also Pioneer Express, they had another truck, and we went out over the deep creek, I believe they call them there. Then we get out from there and walk down with snow shoes to the creek, to the camp. [137]

Q. Did you remain then at the camp?

A. No, we worked there all day, we were trying to get that cat started and clean the road out so that we can get our supplies in.

Q. Was there a caterpillar tractor there?

A. That's right.

Q. And was that the caterpillar tractor that was mentioned in the lease?

A. No, Mike — We don't have in the lease, but Mike make arrangements if we can get that cat started and plow the road out, which he had to coming in, you know, to camp. Also they had houses down there about two miles from the mine down the other creek, and he liked to see us plow the snow out so he could coming down toward his house. That was the agreement with us, take the bulldozer and clean the road out.

Q. And did you clean it out down to his house?

A. No, not to his house. We cleaned to the camp,

(Testimony of James Zukoev.)

then later on we cleaned to his house, but not that time we didn't clean it.

Q. What was the condition of the camp when you got there, Mr. Zukoev?

A. Well, camp was in condition the way we leave in the fall, was nothing clean except supplies was over there, and I believe each time he had lay out there they leave the supplies and Mike leased it out, somebody sell it over again. That is [138] it. Then when he closed the camp he send me out and I bring the grocery, all the groceries he had over there, brought it to his house at Cushman and Seventh.

Q. That was in '41?                      A. 1941, yes.

Q. How long did you work on getting that road cleared out?                      A. We worked two days.

Q. And what condition was the equipment in at the mine?

A. The mine had, about, I imagine, around 16 feet of water and we had to start the boiler so we can get steam and drop down bucket, and bucket fill up with water and coming out and dump it up on top so we can get in down the hole and get that rest of ice out.

Q. You had to bail some water out, then?

A. Yes. With a hoist, yes.

Q. What machinery did you have there, Jimmy?

A. Well, he had two old boilers, one is thirty-pound, and the other one I think is either twenty-five-pound or something. Either of them is any good hardly to keep up steam when you have them run-

(Testimony of James Zukoev.)

ning. If you have more than 15 points, then it can't keep up steam.

Q. Did you have a hoist? A. Yes, we had.

Q. What type of a hoist was it?

A. The hoist was double-drum hoist. [139]

Q. Steam operated? A. That's right.

Q. After you got the boilers going and the camp set up and the water bailed out of the shaft, what did you do?

A. We have to rig it up, take some 50-gallon drums, and have to go down to the creek and haul the water and fill up the boilers and then we fire it up. I mean we have a sump inside so we can fill it up with water, then use the hoist, which I go down there first, and I told Nick and Paul, "If I holler, hoist me back." I still was afraid that water rise.

Q. Now, after you got down to the ice, what did you do?

A. I started picking ice and hoisting it up.

Q. How long did you pick ice in the shaft, Jimmy? A. I don't suppose over a month.

Q. And then what did you find when you got down to the ground?

A. I find a lot of slough. When the water get in drift, all of it slough in, wash the gravel down, and when you are driving through, you put the laggings each side timbers—laggings. You always leave between the laggings about six or eight inches space. If any pressure come, you have to draw that dirt out, bleed it out, so it don't break the timbers in.

Q. Did you put the lagging in?

(Testimony of James Zukoev.)

A. Yes, I did, I working at that time for Mike Stepovich.

Q. What condition was that drift in that you started to [140] follow?

A. The drift was all right. The only thing was slough, a lot of slough there and frozen right down to the track. We had a little track down there, rails.

Q. The track was in there when you went down, was it, Jimmy?

A. Yes, it was about around sixty feet, something like that.

Q. And then what about the ice in the dump?

A. Well, you have to dig it up.

Q. How long did you work in that drift until you came to the face of the drift?

A. I know Mike coming down, he told me, he said, "There's a drill hole that was——"

Mr. Cole: Now, just a minute. I object.

The Court: Mr. Zukoev doesn't understand, so just listen to the question put to you by counsel and answer, rather than tell what somebody else told you.

The Witness: O.K.

Q. (By Mr. Taylor): What did you do, then, after you came to the face of the drift, Jimmy?

A. I started driving tunnel.

Q. How big a tunnel was that? What was the size of it?

A. That clears six by seven, inside the timbers.

Q. Did you timber as you drove that tunnel?

A. Yes, I did.



(Testimony of James Zukoev.)

Q. Do you remember how far you drove that tunnel, Jimmy?

A. I drive it—what Mike lifted out, I drive it from there over I think it was 79 feet.

Q. And then what did you do?

A. I coming to the old work and then drill holes.

Q. Whose old work was that?

A. That was Mike's own work, at the time he had trouble with the boys he taken——

Mr. Cole: Well, now, I object again, your Honor. It is the same thing.

The Court: Yes. The jury will disregard that remark.

Q. (By Mr. Taylor): Well, now, do you know when that had been, when those old workings had been working, or do you know who had been working in there? A. Yes.

Q. Who?

A. It was Alec Tavitoff, and Jake Hohoff, and Nick Romanoff, and Alec Carlson.

Q. When you drove in from the shaft, did you change your directions to get to that old drill hole?

A. Yes, I did.

Q. And then when you got there, what did you find? [142]

A. We didn't find nothing but old working and drill holes.

Q. Did you do any panning at that particular place? A. I did.

Q. And then what did you do?

A. Then I came back, oh, around, I don't know

(Testimony of James Zukoev.)

exactly how many feet it was, I worked toward the pay streak, started driving another tunnel there.

Q. Did you know about where that pay streak was, Jimmy?      A. Sure, I do.

Q. And then did you change your directions any more?      A. Yes, I did.

Q. In which direction were you going when you——      A. I go down east.

Q. East, and then what direction did you change? You say you changed your direction?

A. I changed my direction so I can get away from the old work, old drift.

Mr. Taylor: Maybe we could put this up and have that Identification, Exhibit 1.

Q. (By Mr. Taylor): Now, Jimmy, would you step down and with this ruler, will you stand either over on the other side or this side so you won't obscure the view of the Court or jury?

A. This is the side I seen from Mike Stepovich. Then [143] we drive the tunnel up this way and drive tunnel this way, and then he told me, "You go on up this line." (Indicating.)

Q. Wait a minute. What are you talking about now, Mr. Zukoev?

A. When we start on the shaft.

Q. In 1942?      A. 1941.

Q. 1942.      A. 1942? O.K.

This is where we was, up to here, from Mike Stepovich, right up here. We drive this tunnel up here, when we get the land, and then a cross cut this way. This was where there was drill holes, and

(Testimony of James Zukoev.)

I can find nothing but the old work except that this drill hole was about five feet from the old work, and I take the pan from there and I don't find any more than maybe four or five cents. Then I get mad and I go down to his house, and I told Mike, I say, "I don't find nothing but the drill holes, also I get into the old work," and he said, "Go on wherever you want if you want to start," so I gone back from here and start cutting from here over, and then I come into the pay streak here (indicating). That is where the pay streak is, right along here.

Mr. Cole: There is no testimony that there is any pay streak along any place, and I ask that that remark be stricken.

Mr. Taylor: Yes, there is testimony, your Honor.

Mr. Cole: I think it is quite important, your Honor, that all [144] the testimony in the record is they came up and they found some pay some place, but there is no evidence that there is any pay streak any place.

The Court: I think perhaps at this time it would be incorrect to designate it as a pay streak, until and if the testimony should bear that out. There has been testimony of what was found at a certain place, but I think the objection is well taken.

Q. (By Mr. Taylor): When you were driving that way, what was your object? What were you searching for, Jimmy?

A. I was searching for the pay streak so we can get something out of it.

Q. What do you call a pay streak?

(Testimony of James Zukoev.)

A. A pay streak, where you can get the gold.

Q. How much gold?

A. We figure, when we weigh that ground, we figure on at least from three up to four dollars a foot. That's the way it was——

Q. When you drove from here, Jimmy, this way, how far was it over to the end of that drift?

A. Well, it ought to be not over 45 feet.

Q. Now, when you got to where this drift extends here (indicating), what, if anything, did you find?

A. Well, what I find here, old work, all around here, and [145] I can't go any further on that old work, so I came back and started from here (indicating) over to here, right from here I build a car station up here, then start from there back.

Q. You drove another tunnel in here?

A. That's right.

Q. How long was that?

A. We worked there, I think we worked around three months and a half, go right through to the——coming to what we was looking for.

Q. Calling your attention to this drift here, when you went in there (indicating), what did you do with that drift?

A. I panned and I didn't find anything, so I let it go.

Q. What was the condition of that drift?

A. It was all right.

Q. And you didn't find anything in that drift?

A. Nothing worth anything.



(Testimony of James Zukoev.)

Q. Then how far did you come back this way from the junction of these drifts to where you drove the off-shoots?

A. Oh, around from, I don't know if it was 25 feet or 30 feet, something like that.

Q. So there should be another drift shown on here; is that right? A. That's right.

Q. And then when you drove that drift in, what did you do in regard to testing the ground as you drove? [146]

A. I was driving five points, and I keep cable behind me so there won't be slough coming down and somebody get hurt, and then I keep crating also, and when I come to the end ground, I mean, what we was looking for, where we can find it, then I start cross-cut, both of them.

Q. On this pay? A. That's right.

Q. After you hit that pay, how far did you drift each way along the face of it?

Mr. Cole: Your Honor, he is leading the witness into saying he found pay, and I wish the witness would testify. If he found pay, I don't mind him testifying to it, but Mr. Taylor keeps saying he found pay all the time and I object to it.

Mr. Taylor: He said he found it.

Q. (By Mr. Taylor): What did you find here, Jimmy? A. We find the pay gold.

Q. What did your panning show?

A. We panned from sometimes dollar, sometimes less than dollar, sometimes over dollar. It all depends on how you take your pan. If you take it

(Testimony of James Zukoev.)

high, that will be smaller than your pay, but if you take it right off the bedrock one foot or two feet, then your pan is richer.

Q. How did you take them? [147]

A. Well, I take it average.

Q. About how high would you say?

A. Six feet high.

Q. And down to bedrock?

A. Down to bedrock.

Q. And what would you scrape that in? How would you take it off?

A. I always set pan there and take the pick and cut it down, scratch it clear down, until I get my pan filled up.

Q. Then you would pan it?

A. That's right.

Q. And then when you strike ground like that, what do you call that ground?

A. I call that pay streak.

Q. Is that the common term among miners?

A. That's right.

Q. So then you struck the pay streak then in here (indicating) and then you drifted both ways, thirty feet on one side and thirty feet on the other side?

A. Yes, I give it ten points each side.

Q. And then did you drift into—did you start taking the dirt out of what you call the pay streak?

A. That's right.

Q. And about how deep did you go into that pay

(Testimony of James Zukoev.)

streak, or start removing the dirt from that pay streak? [148]

A. I give it three thaws there. I give it three thaws.

Q. Now just describe a thaw.

A. That's a twelve feet long point. I drive that three times, three sets. That's when we start digging out—we had two out, but the other one there.

Q. And then how far did you go into the pay streak and were removing the dirt and gravel from there? A. It would be over thirty feet.

Q. Thirty feet into the pay streak?

A. That's right.

Q. Following the pay streak?

A. That's right.

Q. But you had it opened up about—the side of it exposed about sixty feet; is that right?

A. That's right. Each point you drive will give you three feet apart. I had ten points on each side. That is sixty feet.

Q. Sixty feet. So would you have those spaced from one end of that drift along the face of the pay streak then? A. That's right.

Q. And you think you went in—I mean from the face of the pay streak, how far did you thaw in altogether? A. Well, 62 feet.

Q. What? A. Sixty-two feet altogether.

Q. Sixty-two feet? [149]

A. That's right.

Q. That you drilled — drifted along the pay streak; is that right? A. Yes.

(Testimony of James Zukoev.)

Q. So then when you got drifted along there, exposed for sixty-two feet, then how far did you come into the pay streak?

A. From this line (indicating)?

Q. Yes, from there. This way, across the pay streak.

A. Well, we go, I don't know, 78 feet or 79 feet.

Q. No, I don't think you understand, Jimmy. After, you said you got the face of your pay streak exposed?

A. Yes.

Q. You say for 62 feet. Now, when you started to take that out, how deep did you get into the pay streak, how far?

A. That would be thirty-two feet.

Q. Thirty-two feet you took out. You took thirty-two feet out, and how high?

A. Six feet.

Q. And length? A. About 60 feet.

Q. Sixty feet. 60 by 32 by 6; is that right?

A. That's right.

Mr. Taylor: If the Court please, I would like to have Mr. Zukoev show on this illustration here approximately where this would be, only for illustrative purposes. [150]

The Court: Ask him if he can draw a line indicating the drifts. Can he locate it reasonably accurately?

The Witness: We come from here (indicating) back about here, and we drive the tunnel here (indicating), and then when we get here we started



(Testimony of James Zukoev.)

that way and go here, but points all along here (indicating).

Q. (By Mr. Taylor): That's where you had your points set? A. Yes.

Q. Along the 33 feet——

A. 32 feet.

Q. ——or 60 feet.

Now, during the time that you were taking the dirt out of that face, or what you call the pay streak, did you continue to pan that?

A. Yes, I did.

Q. And generally what were the results of your panning, while you were in that particular area?

A. Well, that's what I say, if I take the pan average, sometimes dollar, sometimes less than dollar, and then if you take above the bedrock——

Q. Jimmy, we want you to state your method of panning, if you did pan regularly, and what the results of that panning were—your way of panning.

A. Average, I would say maybe \$1.80, \$1.60.

Q. Now I believe you may resume your seat, Mr. Zukoev.

Do you remember approximately what time in—what was it, that you struck this pay streak?

A. What time we struck that?

Q. Yes, about the date.

A. I believe it would be around the first, either the first part of July or the last part of June.

Q. Of June?

A. Yes, the last part, I believe.

Q. What? A. Yes, the last part of June.

(Testimony of James Zukoev.)

Q. You were working in this pay streak, then, in June, were you? A. Yes.

Q. How long did it take you, Jimmy, to drive this from here over to here (indicating)?

A. It was part of that tunnel I drive for Mick Stepovich in 1941.

Q. No, but where you came into the face of it and drove on over to this junction point here.

A. Oh, around two months, I believe.

Q. And then you drove over to another spot over here (indicating). How long did that take you?

A. I gave it three thaws there, small—two points each time. I wanted to find out the drill hole. [152]

Q. And then you came back and went over, you came, and did you come over on this drift here that was already there? A. Yes.

Q. And then you went back and came across that way (indicating); is that right?

A. That is right.

Q. Did you make any clean-ups off of that dirt out of that particular area?

A. Dirt from the pay streak?

Q. Yes. A. No, we didn't.

Q. Now, when you got this shaft and the tunnel into here cleaned out to the face, what did you do with the dirt after you started driving your drift on to where you were going?

A. Well, this hopper, when we worked for Mike Stepovich he left a hopper which all of us use to dump inside that hopper this pay dirt and every evening you go down there and sluice it out. That's

(Testimony of James Zukoev.)

where we had the hopper already which Mike left over there, you know, that low-grade gravel, but that give you a chance to haul your dirt so it don't run over your boxes or any place, and we sluice every night.

Q. Was that when you were driving over here (indicating)?      A. That's right.

Q. And was that the dirt that you got your first clean-ups out of? [153]      A. That's right.

Q. Now, would you state the amount of gold that was taken out on your first clean-up?

A. Eleven hundred something.

Q. And each one of them eleven hundred?

A. I think so. Every time we clean, I don't know, I had to go down the hole and drive the points. I left it up to Nick.

Q. Now, Mr. Zukoev, did you see Mr. Stepovich occasionally at the mine?

A. At the time we worked?

Q. Yes.

A. Sure, every day, pretty near.

Q. And what would he do there?

A. He coming down the hole and take pans and go up and pan.

Q. Did you ever have any conversation with Mr. Stepovich?

A. No, he just talked friendly, that is all.

Q. He talked what?

A. Just like two friends, that's all. Never had any argument or anything that I know of.

(Testimony of James Zukoev.)

Q. And did he ever discuss the boundaries of the claim with you?

A. No, I never did, but when Joe Ullmer coming out I know something is wrong. [154]

Mr. Cole: I move that be stricken, your Honor.

The Court: It will be stricken.

Q. (By Mr. Taylor): Now, when did Joe Ullmer come out?

A. Well, I was down drift——

Q. Just answer the question, Jimmy. When did Mr. Ullmer come out there?

A. He coming out around August, the first part, I don't know. I didn't keep track when he came out.

Q. What did he do when he came out?

A. He coming out and asked us if——

Mr. Cole: Objection, on the ground that it is hearsay.

Q. (By Mr. Taylor): What did he do, not what he said. What did he do?

A. He came down there and camp with us in the bunk house, he stay with us in bunk house, and then he was working down at the Stepovich's, but stayed over there in bunk house with us.

Q. What was he doing?

A. Well, he asked us if he can go down the drift and survey.

Q. Did he do that?

A. For a while I didn't want him to go down drift. I want to find out why he want to survey the ground.



(Testimony of James Zukoev.)

Q. Did you find out from Mr. Stepovich what he was doing?

A. He went down and talked to Mike and he came back and he say, "How about surveying top, then?" So I told him, I said, [155] "You can't survey this ground. That ground belongs to us unless you go to town and get permit from the Marshal office," and then Nick talked me out of it. He said, "Let Joe go down and survey the ground."

Q. Did he survey it underground?

A. Yes, I helped him.

Q. You helped him?

A. That's right.

Q. And did you ever get a copy of that survey?

A. Yes, we have.

Q. How long have you known Mr. Ullmer?

A. I know Joe since 1927.

Q. What is his profession, if any?

A. He is an engineer, mining engineer.

Mr. Taylor: If the Court please, it is about ten minutes after three.

The Court: Yes. I didn't want to interrupt you. Members of the jury, please heed the admonition I have previously given to you. We will take a ten-minute recess.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: You may proceed, gentlemen.

Q. (By Mr. Taylor): Now, Mr. Zukoev, I asked you prior to the recess about [156] from the time that you started, that you arrived at the camp, until

(Testimony of James Zukoev.)

you hit the pay streak, about how long it took you to do that work.

A. You mean that Mike leased it out?

Q. Sir?

A. Do you mean when Mike leased it out, before we take it over?

Q. Yes. From the time that you took it over on the 22nd day of February until you hit the pay streak, how long elapsed?

A. I imagine over five months.

Q. Do you remember about what date it was that you hit the pay streak?

A. No, I don't remember that date.

Q. Did you have an opportunity to refresh your memory on that during the recess, Mr. Zukoev?

Maybe I can put another question. Just a moment.

When I asked you how long it took, before you stated you got over here in June; that you hit the pay streak in June, was that correct?

A. No. No, that couldn't be. We was in June up at this side to the—almost to the old drift.

Q. To what?

A. To the old work over at this side by the drill hole.

Q. You were over here in June to that drill hole (indicating)? [157]

A. That's right.

Q. So then you came back and worked across over here to the pay streak—that was sometime in June?

A. I imagine it would be around, I don't know,

(Testimony of James Zukoev.)

either it was — it was around the 20th of July. I don't know for sure what date it was, but we had an awful short time to try to get into the main pay streak.

Q. Another thing, Mr. Zukoev, what were your particular duties in the partnership business there?

A. My duty was in charge under the ground.

Q. And you used the expression that you made a thaw. Will you explain to the jury what making a thaw means?

A. Well, thaw, you can drive the points——

Q. Just explain what a point is, first. Explain that.

A. It is points made out of pure steel and it is a hole inside and there is a nipple close to the head, and you connect that with a hose, a steam hose, and then you have a hammer, and you start driving that to the frozen gravel. That's a point.

Then, when you get that point in, you take it out and put the sweater in, a half-inch pipe, and you thaw with that.

Q. How long do you leave that pipe in there after you get that hole in?

A. It all depends on the kind gravel you get. If you get gravel — some of it you leave 24 hours, some leave 16 hours, some leave 12 hours, it all depends on your gravel. Over there [158] we never leave it more than 14 hours.

Q. You also stated that you opened up the face of this pay streak 62 feet and you made two or

(Testimony of James Zukoev.)

three thaws. How many thaws did you make on that?      A. I made two thaws.

Q. How many?      A. Two.

Q. Two, and how much ground — that is, when you drive these points in, how much ground can you thaw with what you would call one thaw?

A. You always thaw a little more than the length of your points.

Q. It will thaw a little farther in — that hot steam?      A. That's right.

Q. Now, you made two thaws. How much of that ground that you thawed in the face there, Jimmy, was moved to the surface of the ground?

A. Well, there was 31 feet, I figure, on each side the tunnel.

Q. Just a moment now. Just repeat that. I didn't understand it.

A. You mean how much aground we take out?

Q. Yes, off of the pay streak.

A. We take six by sixty-two by twelve.

Q. And then on your second thaw, what became of that [159] ground?

A. We take part of them out and we don't know what happened either.

Q. You took part of it out. Did you take it all?

A. No, we didn't.

Q. Why?

A. Because Marshal coming out and close us down.

Q. What did you do with the—did you have any equipment down there at that time?



(Testimony of James Zukoev.)

A. We had all the tools down there. We had eight wheelbarrows, and then we had picks and shovels, points, hammer, steam hose, sweaters, and then rails, cars. We also borrowed from Martin Sather 360 feet of pipe. They are also down there.

Q. Did you ever return to get that equipment?

A. No, we didn't.

Q. Then, when the Marshal came, did you go to the surface?

A. Yes, I was down in the drift, and I heard a pipe was rattling. A rattling pipe, that is a signal from the hoist men to the drift. Anything happens, then he raps the pipe with a hammer, then you have to come out and find out what is wrong.

I coming down to the shaft and hollered up, and he say, "There is a Marshal up here and you have to come and all the boys coming up," so we coming up and we never could get back to the hole or any other place.

Q. How long did you remain at the camp after the Marshal [160] came out?

A. Nick and I didn't get our bedding, but rest of them they give them time to roll up their bedding and get out from the camp.

Q. Jimmy, would you state whether or not you put any of that you had thawed in the pay streak through the sluice boxes?

A. Yes, we did some.

Q. About how much sluicing of that particular ground did you do?

(Testimony of James Zukoev.)

A. I imagine around five hundred yards or more.

Q. And then when you left there, how much dirt was there in the dump at the top of the shaft?

A. The hopper was full, which we was figuring washing in the evening but we never had no chance to wash it.

Q. You talk about the hopper. What is the hopper?

A. Well, the hopper is, they build a hopper on top of the sluice boxes. Then you dump a lot of dirt on top of that, and then you keep on sluicing so you can cut the trench. The more you dump, the hopper gets bigger, and sometimes you can dump three or four days, fill up hopper. That's what they call a hopper, was a trench all around sixteen or eighteen feet high on each side.

Q. How high?

A. Sixteen, eighteen feet high. That's gravel, each side. Each side of your boxes, in other words.

Q. How big a hopper did you have there on this particular claim?

A. I imagine it was about hopper from end to end, on top of boxes, would be 40 or 45 feet long.

Q. And was there any dirt in it or any ground in it when you left?      A. There sure was.

Q. And, now, what were you allowed to take with you when you moved out on the Marshal's orders?

A. Nothing at all. Just allowed, just the fellows

(Testimony of James Zukoev.)

that worked for us, they allowed them to take the bedding, that is all.

Q. Did the Marshal explain to you why he was taking over your personal property there?

A. That's right.

Q. What did he say?

A. He said Mike Stepovich brought Marshal against us because we owed him \$2,900 and he said to "Close your voice; you have to get out from the property."

Q. Did you leave that same day? A. Yes.

Q. After you left there, where did you go, Mr. Zukoev? A. We came to town, Fairbanks.

Q. And did you ever go out there again?

A. Yes, we went to Marshal's office and get permit so I [162] can go out and get our bedding.

Q. Get what?

A. Get permit from United States Marshal so we can get our beddings.

Q. How long was that after you were put out?

A. Oh, about a week.

Q. Then, did you ever go back——

A. No, I never did.

Q. ——to that country at all?

A. No. In other words——

Q. When you went back about a week later, what was the condition of the dump which you had taken out? A. The dump was still there.

Q. Did you ever visit that place later to see whether the dump was there?

A. No, I didn't.

(Testimony of James Zukoev.)

Q. Now, at the time that this suit for \$2,900 and other matters was brought, Jimmy, did you ever read the complaint in that case?

A. No, I didn't.

Q. One of which is the first count, the first cause of action, that you and your partners owed Mr. Stepovich the sum of \$2,900 for rent of a caterpillar tractor, RD-7. Did you ever rent such a caterpillar from Mr. Stepovich?

A. No, we didn't. [163]

Q. You did, though, in the lease rent a 22?

A. That's right.

Q. So, then, were you indebted, as alleged in the second cause of action, to Ferguson and Rutherford, in the sum of \$18.60?

A. Yes, we had lumber from them.

Q. And what payments, if any, had you made to Ferguson and Rutherford?

A. Well, I don't know. Nick was handling all that.

Q. And also as set forth in the fourth cause of action, did you owe Mr. Barrack, J. E. Barrack, eleven dollars?

A. Yes, we had something for the boiler, I believe it was.

Q. And in the fifth cause of action, did you have an indebtedness to Northern Commercial Company of \$187.99?

A. Yes, that's right.

Q. If you were paying the Northern Commercial, how were you paying them?

A. By the month — I think Nick paid them by



(Testimony of James Zukoev.)

the month. It got so it was over three hundred dollars something, but we had to pay two hundred dollars and the other we couldn't pay 'cause they assigned it to Mike Stepovich.

Q. Now, according to exhibits, that suit was dismissed against you on November the 24th. Did you ever go back there and try to resume mining operations after the 24th of November 1942? [164]

A. Well, we was thinking over and I heard, a fellow named Mike Jewich——

Q. I just asked you: did you go back and resume the mining operations? A. No, we didn't.

Q. And why not?

A. We filled that shaft full of water, and you couldn't work.

Q. And if you filled the shafts up, would the drifts also be filled with water? A. Yes.

Q. At that time of the year, would that water be in its liquid state, or would it be ice?

A. Sure, there would be all—the drift would be back in and all filled up with the slough.

Q. Slush? A. Yes, gravel.

Q. Did you ever hunt over in that country after this happened, Jimmy? A. No, I didn't.

Q. Before you left there, were you given authority to clean up the gold in the sluice boxes?

A. I didn't hear you.

Q. I say: before you left there, were you given any authority to clean up the gold in the sluice boxes? [165] A. No, I didn't.

(Testimony of James Zukoev.)

Mr. Taylor: May I have just a moment, your Honor?

The Court: Certainly.

Q. (By Mr. Taylor): Mr. Zukoev, I hand you Plaintiffs' Exhibit R and ask you to examine those and tell me whether you have seen them before.

Did you see those signs?      A. Yes, I did.

Q. Where?      A. Right here in this court.

Q. What?      A. Up here.

Q. Did you ever see them at the mine?

A. Yes, they had a notice up there.

Q. A notice similar to these?      A. Yes.

Q. Now, Mr. Zukoev, for the purpose of refreshing your memory, did you ever go out to the mine with Mr. Radovich——

Mr. Cole: Well, your Honor, I object. Object to as leading his witness or refreshing his memory. There isn't any evidence here that the witness' memory needs refreshing.

The Court: He said that he wasn't out there.

I am going to permit the question to be put.

Q. (By Mr. Taylor): Can you answer the question? [166]      A. I didn't hear it.

Q. Did you ever go out to the property around 1946 or 1947 with Mr. Mikulis and a Mr. Radovich?

A. I go down to Martin Sather's camp. That is as far as I go.

Q. How close was that to the——

A. Well, from there over, it would be eight miles at least.

Mr. Taylor: That is all.

Mr. Cole: No questions.

The Court: You may step down, Mr. Zukoev.

(Witness excused.)

Mr. Taylor: I call Mr. Tavitoff.

The Court: Mr. Taylor, how many more witnesses do you expect to call?

Mr. Taylor: I believe I have just one more, your Honor.

The Court: And he is not here at this moment?

Mr. Taylor: No. He has been sitting around here all the time.

The Court: The only reason I am inquiring, we got off our schedule a little. Perhaps this would be a good time to take a ten-minute recess. You will have him here?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you, and we will take a ten-minute recess. [167]

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: It looks like the defendant is ready to proceed.

Mr. Cole: Yes, your Honor.

The Court: Has your witness shown up, Mr. Taylor?

Mr. Taylor: No, your Honor, he did not, but one of the defendants is out trying to find him. He

walked out just a few moments before the recess and Mr. Zukoev is looking for him. He may be here in a few moments.

The Court: Well, we cannot possibly judge the reason for his disappearance yet.

Mr. Taylor: No, we surely can't. He has been sitting here all day yesterday and today.

The Court: What do you suggest?

Mr. Taylor: I move for additional time.

The Court: Ten minutes?

Mr. Taylor: That would help, your Honor. I don't think his testimony will take over 20 or 25 minutes.

The Court: Very well. We will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken, awaiting the arrival of the next witness.) [168]

Clerk of Court: Court is reconvened.

The Court: Are the parties ready to proceed?

Mr. Taylor: Yes, Your Honor. I would like to call Mr. Tavitoff.

### ALEC TAVITOFF

called as a witness on behalf of plaintiffs, after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Taylor): Will state your name, please?      A. Alec Tavitoff.

Q. And where do you reside, Mr. Tavitoff?



(Testimony of Alec Tavitoff.)

A. I live in Fairbanks.

Q. What is your occupation? A. Miner.

Q. And how long have you lived in Alaska?

A. Since 1911.

Q. And how long have you been engaged in mining? A. Since then.

A. And has that been in the Fairbanks area?

A. Most of it, yes.

Q. What type of mining did you follow, Alec?

A. Placer mining, underground.

Q. Drift mining?

A. Drift mining, yes. [169]

Q. Are you acquainted with a claim on Fish Creek, known as Eastern Star Claim?

A. Yes.

Q. And have you ever worked on the Eastern Star Claim? A. Yes.

Q. When did you work there?

A. It was the fall of 1935.

Q. Who were you working for?

A. For myself.

Q. Who owned the property, the claim, at that time? A. Mike Stepovich's claim.

Q. And did you have agreement in regard to working the mine?

A. Well, we got a lease——

Mr. Cole: That is irrelevant, Your Honor. It has nothing to do with this case whatsoever.

The Court: It may stand so far.

Q. (By Mr. Taylor): Then, under that lease, what did you do, Alec?

(Testimony of Alec Tavitoff.)

Mr. Cole: That is a very broad question, and I object to it.

Q. (By Mr. Taylor): What did you first do after you got the lease?

Mr. Cole: No, Your Honor, it has nothing to do with this case. I mean, I don't want to be objectionable but——

The Court: I am troubled as to the relevancy, Mr. Taylor. [170]

Mr. Taylor: Its relevancy is to show value, Your Honor.

The Court: But you are talking about a lease.

Mr. Taylor: Yes, I am not worrying about the lease. I mean the work he did on the ground. I wanted to see what authority he had for working there.

The Court: Yes, but you have him out there now in the fall of 1935.

Mr. Taylor: Yes, sir.

The Court: You may proceed by question, objection, and ruling.

Q. (By Mr. Taylor): What did you first do in regard to mining operations?

A. Well, we cleaned the shaft out. It was an old shaft there.

Mr. Cole: I think he should say what shaft. We don't know whether the shaft is a thousand yards away.

Q. (By Mr. Taylor): How deep was this shaft?

Mr. Cole: I object to it, Your Honor.

(Testimony of Alec Tavittoff.)

The Court: Yes. We should establish what shaft we are talking about, Mr. Taylor.

The Witness: That was a shaft—I don't know the name of the people that send the shaft before we did, went out there.

Mr. Cole: Well, I——

Mr. Taylor: Let the man answer here. [171]

Mr. Cole: Well, if he answers the question.

A. The shaft, eight by eight working shaft, square, they dig it down to 75, between 75 and 80 feet before they get to bedrock. When they get to bedrock, soon they hit bedrock——

Mr. Cole: Your Honor, I hate to object all the time——

The Court: I will stop the witness at this point.

The Witness: As soon as he hit the bedrock——

Mr. Taylor: Just a moment now.

Q. (By Mr. Taylor): What part of the claim was that shaft located in?

A. The house from where Mike, Mike Stepovich himself was living by the river there, about 700 yards or a thousand yards from there, and it was kind of a little hillside to the creek, a bank, kind of, and it was about five, six hundred yards from the creek.

Q. About what?

A. From the creek, from the——

Q. Did you——

A. Up on the hillside.

Q. Do you know where the boundaries of the Eastern Star Claim were?

(Testimony of Alec Tavitoff.)

A. Yes, that's it. That's what it was.

Q. And near what boundary line was the claim?

A. Boundary line, I don't know where was the boundary line because he won't——[172]

Q. Well, say, the east line or the west line, did you know where they were?

A. West line, our line, was hundred feet, you mean? Are you asking me?

Q. No. I am asking you, did you know where the west or the east line were?      A. No.

Q. And did you know where the north line was?

A. No.

Q. Or the south line?

A. No, I don't know the line.

Q. How did you know that you were on the Stepovich property, then, on the Eastern Star Claim?

A. Well, he take me out and give me the ground to work.

Q. Mr. Stepovich did that?      A. Yes.

Q. And, now, could you examine this plat, this map, over here?

A. I don't know. That map kind of look to me upside down from here to the Fish Creek. I am a very poor map reader.

Mr. Cole: Well, Your Honor, I would object to any examination of that map until this witness establishes that he knows something about that map. Right now he doesn't even know what map or what it is.



(Testimony of Alec Tavittoff.)

The Court: I think Mr. Taylor is trying to establish that. Do you want to take the map off the board, or do you want the [173] witness to step down?

Mr. Taylor: I would like to have him step down and examine this and see if he can point out—

The Witness: Well, I know the creek, if I get the creek here, I can tell you by the creek. The creek from here, it is standing just about west, southwest of it, see, and we were out from the creek—

The Court: Is the creek shown?

Mr. Cole: The creek isn't even shown on this map, your Honor. He doesn't know whether it's the Eastern Star Claim.

The Witness: Well, Eastern Star was about, I would say, a thousand yards from the house up to the westerly.

Q. (By Mr. Taylor): But you don't know where that shaft was?

A. That shaft was in Eastern Star Claim.

Q. Do you know what part of the claim?

A. It's about right in the middle of—a little up to the west, more up to the west from center—easterly more.

Mr. Taylor: If the Court please, I believe that the fact that that shaft was driven there, I think we should be allowed to show the amount of pay or the indications of pay on any part of the claim for what it's worth.

(Testimony of Alec Tavitoff.)

The Court: The difficulty is the witness so far has merely testified that he was on the Eastern Star Claim.

Mr. Taylor: That's right. [174]

The Court: But the location is not shown by the witness. I don't know how many shafts there might have been there. There is no testimony as to that.

Q. (By Mr. Taylor): Had anybody else mined on that ground at that time, Alec?

A. That was the first shaft in that Fish Creek for placer mining. The first, number one, shaft.

Q. So there was only the one shaft there at the time that you were there?

A. That was the first shaft that was on that creek for mining.

Q. And then after you got that shaft cleaned out, what did you do?

Mr. Cole: That is totally irrelevant, what he did after he cleaned the shaft, Your Honor. We don't know which shaft he is talking about.

Mr. Taylor: I think any part of the claim, Your Honor. I think any part of the Eastern Star because it is——

The Court: I would be afraid of that, Mr. Taylor, to be able to show value of any part of the claim.

Mr. Taylor: It shows that the claim was gold bearing.

The Court: Well, but to show the gold-bearing

(Testimony of Alec Tavitoff.)

properties in a territory that is not germane to this lawsuit would not be helpful to the jury. [175]

Mr. Taylor: The claim was 1,320 feet by 600 feet, Your Honor, so it would be in a fairly confined area.

The Court: What testimony did we have as to the size of the claim?

Mr. Taylor: That is judicial. The Court could take judicial notice of the size of the claim. That is the biggest claim you can get. We haven't tried to prove that, Your Honor, because that is established by law.

The Court: Well, I would be afraid to let the testimony in without having the location of this gentleman's work spelled out. You have testimony now as to the shaft in 1935, which was seven years prior to the time involved. It seems to me it would be a little dangerous.

Mr. Taylor: I can't see the danger part of it, Your Honor, the fact that it shows that a large part of this claim was gold bearing. Many people have worked it since then, but this happened to be the first man on that part of the creek that worked on the gold mine, but I am not going to argue with the Court. I will excuse the witness. I think, though, that the jury should be allowed to take into consideration for what it is worth, with the warning that although it is not shown on there, it indicates that the claim was a gold-bearing claim.

The Court: I would think counsel would be able

to get the testimony of this witness in very properly, by locating the place where he did mine in 1935. [176]

Mr. Taylor: Would the Court now adjourn until tomorrow morning?

The Court: I think it is important enough so that I wouldn't want to preclude you from attempting to locate where this man worked.

Mr. Taylor: If the Court please, could we take an adjournment until tomorrow morning?

Mr. Cole: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Cole: I would like to say that the witness is on the stand and he has an opportunity to testify as to where he was and where he drilled the hole, and these claims are big claims. We don't know the size of this claim, but plaintiffs' own proof shows that there wasn't gold-bearing ore in a large part of where they were already. Now, some place on this claim, we don't know where, this man wants to testify he drilled the shaft, and I don't know what the results of that shaft will show, but I would like to say this: if he remembers and he knows, he can testify to it right while he is on the stand now without taking an adjournment until tomorrow morning. I think if he knows he can testify to it now. I would object to any continuance until tomorrow on that issue.

The Court: Well, I realize, too, that the attorneys have had a long time to prepare this lawsuit.



Mr. Taylor: I never knew, Your Honor, that this man was [177] a witness until yesterday. That's why I've had him here.

Mr. Cole: He has already said he doesn't know. I don't know what else there is to say.

Mr. Taylor: Your Honor, I believe if I could get a map of the Eastern Star Claim that Mr. Tavittoff can pinpoint on that practically the location of the shaft.

The Court: Of course, this was the plat that was put into evidence by the plaintiffs.

Mr. Taylor: No, it does not show only one boundary, Your Honor. It does not show the north and south boundaries. The only boundary that shows on this is the eastern boundary. It doesn't show the south or the north boundary.

The Court: Well, for the sake of twenty-five minutes' Court time, why, I am not going to cut the plaintiffs short, but I will hold the plaintiffs to strict proof in the morning at ten o'clock, and I will now grant the motion for an adjournment until ten o'clock tomorrow morning made on behalf of the plaintiffs and resisted by the defendant. I admonish the jury not to discuss the subject matter of this trial with anyone nor among yourselves and do not form or express any opinion of the subject matter of the trial until the case is finally submitted to you. Will you please return to your places at ten o'clock tomorrow morning?

(Thereupon, at 4:40 p.m., October 15, 1957,

an adjournment was taken to 10:00 a.m., October 16, 1957.) [178]

Be It Remembered, that at 10:00 a.m. October 16, 1957, the trial of this cause was resumed, The Honorable Vernon D. Forbes, District Judge, presiding:

(The jury was not present in the courtroom.)

Clerk of Court: Court is now in session.

The Court: I have had the jury kept out to see if there is anything we can accomplish before calling the jury in.

Mr. Taylor: I was going to bring up the question of the admissibility of Plaintiffs' Identification 19, which has been offered, and I think with the testimony of Mr. Zukoev that we have laid the proper foundation for the admission of that.

The Court: Am I to construe your remarks as re-offering the Identification at this time?

Mr. Taylor: I am re-offering it, your Honor, yes, sir.

The Court: According to my notes, Identification 19 is the sketch of claim.

Mr. Taylor: That is the drawing by Joe Ullmer, mining engineer. I would like to say in that respect, Your Honor, that Mr. Zukoev testified as to the dispute as to the boundaries and that as a result the defendant in this case employed Joe Ullmer to make a survey of the underground workings to ascertain whether or not the workings had extended through the exterior boundaries of the claim, and I

think, Your Honor, that matter would be evidence that the plaintiffs in this case were correct and that the evidence against—it would be a declaration [179] but against the defendant, that was made at his request and at his expense.

The Court: As I see it, Mr. Taylor, the only thing that is added since I refused the identification into evidence is the testimony of James Zukoev, as you have outlined, to the effect that he said that Joe Ullmer was hired or retained by the defendant, Mike Stepovich, to make a survey. Is that binding on the defendant here? And he said that he did receive a copy of it, and that is the only additional ground, if any ground that be, to admit the identification into evidence.

In view of the re-offer, Mr. Cole, do you have any objection?

Mr. Cole: I have the same objection that I made, that it is just purely hearsay and inadmissible for that reason.

The Court: Yes. I will sustain the objection.

What I have in mind, Mr. Taylor, when we adjourned last night you had a witness on the stand and wanted a little opportunity to look into his testimony a little deeper before proceeding this morning, and I think it proper for me to ask you in the absence of the jury what you propose to prove by the witness.

Mr. Taylor: Your Honor, we propose to prove by the witness that he did sink the first shaft, what

was known as Discovery Shaft on the Eastern Star Claim and that it was within close proximity to the workings of the plaintiffs' on the property and that, in fact, one of the old workings that [180] Mr. Zukoev testified to that he broke into was the workings of Mr. Tavitoff and in one of the drifts that Mr. Tavitoff ran for 100 feet that he took out approximately \$6,000 in gold dust. He had a very limited area to work. He was shown where to put the shaft down, and then he could drive a shaft any direction he wished for 100 feet, and that was the limitation, and one of the drifts that he drove for 100 feet he extracted some \$6,000 from it.

The Court: What I am wondering about is whether I can treat your statement as an offer of proof and make a ruling at this time or whether you wish to have the jury brought in and put the witness on the stand and attempt to elicit his testimony, subject to objection.

Mr. Taylor: Either way that the Court desires. I have talked with him this morning. His memory has been refreshed, because it was 22 years ago that he sunk the Discovery Shaft on the property and we have other testimony that that shaft is still there and that it is still known as the Discovery Shaft.

The Court: Which way do you prefer, to call the jury in and go ahead, or do you wish to make a formal offer of proof at this time?

Mr. Taylor: Well, if the Court please, I would make a formal offer of proof at this time.



The Court: Very well. Mr. Cole, you heard the offer of proof of the plaintiff.

Mr. Cole: I can't see where it has any bearing on this [181] case whatsoever. I object on the ground that it is irrelevant and dangerously prejudicial. Therefore, I object to the admission of any testimony under Mr. Taylor's offer of proof.

The Court: Mr. Taylor, I realize the importance of this offer to your clients and to this case, but I can't see the materiality of the evidence, and I think it would be prejudicial and not at all helpful to the jury to assist the jury in determining the plaintiffs' damages. I don't believe what this witness recovered in a different location years prior would have any bearing whatsoever on the plaintiffs' damage, any more than I think it would be proper for the defendants to bring in witnesses that mined ground in other places and produced nothing. As a matter of fact, the evidence already shows that these plaintiffs drove drifts and recovered nothing and were in worthless ground and changed their course, and I can't see the materiality of that type of testimony.

Mr. Taylor: I believe that the testimony, Your Honor, uncontradicted testimony, is here that the plaintiffs all the time they were driving the tunnels did get gold. They had three cleanups before they ever hit the pay streak, in which they took out around thirty-five hundred dollars in gold, but what we intend to prove, Your Honor, was that the shaft that Mr. Tavitoff sunk and he hit the pay streak,

and which other miners had also hit and taken off large sums of money. Unfortunately one man is dead, and took out 3,300 ounces in the season on that same pay [182] streak. It only goes to show, Your Honor, that that pay streak runs for a considerable ways there and there would be, if the plaintiffs had been allowed to continue under their contract, they could work all of the next season on the pay streak over to the left limits of the claim. That is the only reason that we put that in, to show that in that particular area there was pay.

Mr. Cole: Your Honor, I would like to say that Mr. Taylor is saying that this witness will testify that the plaintiffs hit his shaft which, first, he can't testify to. It has no relevancy.

Mr. Taylor: No.

Mr. Cole: That is exactly what he said in his offer of proof.

And, secondly, he said the offer of proof would show that the plaintiffs drove to the old shaft worked by Mr. Tavitoff, and the plaintiffs testified they found nothing there, so I don't see what relevancy that has whatsoever. That is the uncontradicted plaintiffs' own testimony.

Mr. Taylor: Your Honor, Mr. Cole is entirely in error in that. I did not say they went to the shaft of Mr. Tavitoff. I said Mr. Tavitoff drove several drifts away from his shaft 100 feet in several directions and they did break into one of the old drifts of his which didn't necessarily have pay, be-

cause he drove three drifts before they found in the fourth drift he did get on the pay streak, because he had to confine himself to one [183] shaft and drive 100 feet in any direction he wanted.

Mr. Cole: There is no testimony that they hit one of his shafts.

The Court: Mr. Taylor, I ask you this, if it is proper: where do you claim that this man, Alec Tavitoff, struck what you call the pay streak?

Mr. Taylor: About in here (indicating) is where his shaft was and that he drove all directions, and once when he came this way he hit the pay streak.

The Court: Is that anywhere near the proximity of the pay streak allegedly struck by the plaintiff?

Mr. Taylor: Here is the pay streak struck by the plaintiff. His shaft was there (indicating), and he struck the pay streak here (indicating), took \$6,000 out of a 100-foot drift.

The Court: What distance is that from the alleged pay streak struck by the plaintiffs?

Mr. Taylor: He evidently struck it 100 feet and he struck pay. I am not going to belabor the issues, Your Honor. It is up to the Court to decide.

The Court: I would only let the testimony in if the witness is able to testify as to the nature of the ground in the alleged pay streak struck by the plaintiffs in this action, but I am not going to permit him to testify to the richness nor the poverty of the ground elsewhere.

Mr. Cole: And I might point out, Your Honor,

that there is [184] no evidence that the pay streak runs any way, this way, or that, and the plaintiffs have never testified that they saw any sort of a shaft down there. It certainly doesn't show on the map, and now the cross-examiner can't cross-examine the plaintiffs in connection with what they found. They also testified in that area they found nothing. Here I am at a tremendous disadvantage. There is nothing I can do.

Mr. Taylor: Your Honor, I don't take issue with the defense counsel for trying to influence the jury, but I don't think he should try to mislead the Court, because there is testimony, Your Honor, that when the plaintiffs drove across here, and Mr. Zukoev showed on here where his points were, that he put two points there, he struck this pay streak; they opened up this pay streak 60 feet and it was good pay all the length of that face, and he did take his money out of there.

The Court: I don't think that is inconsistent with the remarks of counsel.

Mr. Taylor: He said there was no testimony to that effect.

The Court: Well, I think you misunderstood.

The only question is whether or not you wish to rely on your offer of proof and the ruling of the Court or whether you wish to put the witness on the stand for questions, objections and rulings.

Mr. Taylor: I will submit it to the Court, Your Honor.



The Court: Very well, I will deny the offer of proof. [185]

Is there anything else to be taken up in the absence of the jury?

(No response.)

The Court: If there is nothing else to be taken up in the absence of the jury, Mr. Jacobs, will you please ask the jury to come in.

(Thereupon the jury was brought into the courtroom and resumed their seats in the jury box.)

The Court: Will the Clerk please call the roll of the jury?

(Thereupon the Clerk of Court called the roll of the jury.)

Clerk of Court: They are all present, Your Honor, and the alternate also.

The Court: Very well. You may proceed, Mr. Taylor.

Mr. Taylor: The plaintiffs rest, Your Honor.

Mr. Cole: At the risk of inconveniencing the jury, I think that the proceedings are perhaps proper at this time out of the presence of the jury.

The Court: Members of the jury, I realize we are shoving you around quite a little. That is part of the trial of a lawsuit and no one is to blame for this. There are some matters to be taken up out of your hearing, and I will excuse you for at least fifteen minutes and I will send for you.

(Thereupon the jury left the courtroom.)

Mr. Cole: At this time, Your Honor, the defendant moves to dismiss from plaintiffs' complaint all claim for loss of future [186] profits. The motion is based upon the fact that plaintiffs, in their case, have failed to prove any damages other than nominal damages which they might recover for breach of the covenant of quiet enjoyment for which they are seeking recovery. If they are entitled to any damages whatsoever, they are entitled only to nominal damages.

The plaintiffs' complaint, I think, lends itself into two claims: one for \$100,000 for damages, and one for a sum between six and seven thousand dollars for damages for loss of expenses or for expenses claimed as preparatory work done on the claim.

I think that insofar as the claim for preparatory expenses is concerned, that that claim is not as a matter of law recoverable. The recovery for damages for breach of any covenant of quiet enjoyment follows the general rule of law for breach of a contract, those damages naturally and proximately flowing from the defendant's act, and in cases of breaches of covenants of leases, the same rule of law applies.

This limits plaintiffs recovery to loss of future profits and any expenses which he may have incurred in preparing that ground for operation are not recoverable, and I cite as authority for that proposition the case of *Butterfield v. Snively*, 19 *Northeastern Reporter*, 2d Series, page 284, a de-

cision from Ohio in 1937, in which damages were claimed for breach of a mining lease, and the Court expressly held reversing a rather long and confused instruction that the expenses incurred [187] in developing a mining lease are not collectible by the lessee as damages for wrongful eviction.

I also cite the case of *New v. Kinser*, *Southwestern Reporter*, 2nd Series, 1054. It, too, was an action for damages for breach of a lease by the lessor for loss of prospective profits. The lessee claimed damages for loss of prospective profits. The trial Court there had instructed the jury that the measure of damages was the amount that the lessee's operations and expenditures had increased the value of plaintiffs' property.

Now, that is not exactly the same theory of the plaintiff in this action, but it is very close, and it is the nearest phrase in terms of the amount of dollars that the plaintiffs' lessees had expended on the property, and here is what the Court said, reversing the trial court:

"It seems to us that if the plaintiff breached the contract and prevented the defendant performing it, the measure of his recovery is the net profit he could reasonably had made and not the enhancement of the lessor's property. The defendant had prayed for the recovery of lost profits, and the first opinion indicated that was the proper measure of damages. But the evidence was not directed to that end. On his counterclaim the defendant should have shown

the quantity of coal he could have produced if he had not been interfered with, the probable cost and expense, and his net profits." [188]

That is what the Kentucky Court says is the measure of damages for the breach of a covenant of a lease, and they cite considerable authority for that proposition in that opinion, following a long line of Kentucky decisions, but that case, *New v. Kinser* is the clearest-cut proposition or statement of the law that I could find for that proposition, and *Butterfield v. Snively* is a clear-cut holding that the plaintiffs are not entitled to the expenses which they have incurred in preparing this ground for mining operation.

On the contrary, the rule of law, as pointed out by the authorities, and there are many of them, states that they are entitled to their lost profits. So we have to turn plaintiffs' evidence to determine whether they had any lost profits. And what does the evidence show?

Well, it shows, first of all, by plaintiffs' testimony and the testimony of Mr. Kupoff, that they incurred expenses of between six and seven thousand dollars. Their exhibits, their checks, check stubs show expenses of at least four thousand dollars, and added on to that is the testimony of Mr. Kupoff. So without any question they have expended between six and seven thousand dollars in operating that mine between February and August of 1942.



How much money did they take out of the ground? What was their recovery or income? Well, Mr. Kupoff really doesn't recall. He is not sure, but he was able to identify this deposit book [189] in the Bank of Fairbanks, which is Plaintiffs' Exhibit S, and it shows a deposit on June 2, 1942, with the bank of \$1,130. It shows another one on June 16, 1942, of \$1,100. And although Mr. Kupoff doesn't remember it, it shows another one on August 8, 1942, of \$1,296. Adding those deposits, their total recovery of gold from the mine did not exceed \$3,500, give or take a few dollars, but clearly not even \$4,000. So what did their operations show by their own testimony during the summer of 1942 but a loss of between three and four thousand dollars—at least \$3,000. That testimony is unrefuted, that they didn't make any money there in 1942.

Now they are going to come in argue, "Well, we had a lot of rich pay in the dump." But who knows how much rich pay they had in the dump? We don't know whether they ten dollars' rich pay in the dump, or \$10,000 rich pay in the dump. It doesn't show. There is not one shred of evidence other than they had some rich pans they put into that dump. Mr. Kupoff can't remember how much gravel was in that dump. There were some rich pans, apparently, went into it, by their own testimony, but there is nothing in the evidence from which the Court can infer that there was \$3,000 of rich pay in that dump, much less to say the cost

of running the dump through the sluice boxes, which certainly costs more money. So there is no evidence, there is nothing from what anyone can infer that they would have recovered enough gold from that dump that they say existed out there to pay the costs [190] of running it through. So in the final analysis, it is clearly uncertain and speculative as to whether they had any profit for that summer operation in 1942.

I don't know any other way that that can be argued to show that there was any profit in the summer of 1942 but be that as it may, what then? Well, that is not really the point, I don't suppose. The point is: how much money would they have lost had they been allowed, but for the defendant's act, and where is the evidence? Where is the evidence that in their mining operations right here (indicating on map) they say they were, that there was any recoverable ground, profit-bearing ground here, laying there or here or here or here (indicating)?

There is not one shred of evidence in the record that their prospective ground which they would have drilled contains gold in sufficient quantities to make their operation a profitable one. We don't know how much expense they would have incurred in operating in 1943 had they been allowed to operate or continue in 1942. There is no evidence at all of their expenses. Not one bit of evidence which shows their future expenses. There is no evidence as to the price of gold in 1942, unless the Court is

to assume that the price of gold was then what it is now, but I don't think it was. There is no evidence how much gold was in that ground, and there is no evidence as to how much gold was taken out.

So I am certain that the Court is familiar [191] with the basic rules, one of the basic rules of damages, that loss of prospective profits is not recoverable unless it can be determined with certainty.

In the defendant's trial brief, there is case authority to that effect. The Ninth Circuit Court has so stated, quoting American Jurisprudence, Section 21 and Section 23, because the law quite rightfully feels, Your Honor, that we cannot suffer anyone to have verdicts brought in which are mere guesses. And I submit that the loss of plaintiffs' profits from the evidence which they have put into this case is nothing but a hundred per cent and total guess. It is a sheer guess as to how much money they would have made but for the defendant's act. Why, it could go from one dollar or a loss of thousands to a profit of who knows how much. It is absolutely impossible to determine whether they would have made or lost money in their continuing operations. So we can't allow the jury to speculate and sit here and guess. Court after court has held, the Eighth Circuit in *McCormick v. United States Mining Company*, a rather old case but apparently very good law, 185 Federal 748. There the plaintiff was in possession and sued to quiet title to some mining ground. The defendant entered an answer

and was successful in obtaining an injunction prohibiting the plaintiff from continuing to mine the ground, but was required to give a bond to indemnify the plaintiff if the injunction had been wrongful. The injunction was later held to have been wrongfully issued and the plaintiff sued on [192] the bond. It is interesting to contrast the proof which the plaintiff showed there with respect to loss of profits with the plaintiffs' proof in this action. There they had taken detailed samples of the ground, had them assayed, submitted the estimated costs of mining and extracting the ore, the cost of transporting it and smelting it. The Court said, "You haven't submitted enough proof. The law with respect to loss of profits being the basis of recovery in an action for damages is that profit which could have been realized but for the act of the defendant and which are not open to the objection of uncertainty or remoteness may be recovered, but profits depending upon numerous uncertainties and changing contingencies are too indefinite and untrustworthy to constitute a just measure of damages."

That is the case here, too uncertain, too remote, and too speculative.

That is probably the strongest case, factually, which I can cite, because it is clear cut, it is an action for loss of profits from being prevented from mining ground, and there the Court with much more detailed proof said "too uncertain."

Well, there are other cases in the same vein.



There are case after case which hold that unless the operation of the plaintiffs has a past history of profit and that that past history of profit can be projected, then loss of profits are not recoverable, and isn't that very rule applicable here? Here the plaintiffs had operated at a loss. There is no evidence that one day [193] that they had ever operated at a profit, and there is no evidence that they ever would operate at a profit, so I ask the Court to grant the motion and strike from the complaint all claim for loss of profits and for expenses incurred during the 1942 operation.

Mr. Taylor: If the Court please,—

The Court: Mr. Taylor.

Mr. Taylor: —I have followed Mr. Cole's argument with a great deal of interest and also a little bewilderment in regard to citing cases which he claims are in point, especially the one of *New v. Kinser*. That doesn't seem to be any place in point. Neither can I see where *Butterfield v. Snively*, 19 *Northeastern Reporter*, 2d Series, page 284 is in point.

I don't know where Mr. Cole was when the trial was going on, but there was quite a bit of evidence—

The Court: Are you familiar with those cases that you say are not in point?

Mr. Taylor: It is just his interpretation of them. And then the other one, I didn't have it down here—another one in regard to a bond, which I don't believe would be pertinent to this case, your

Honor, but I think we have a case much closer to home and possibly much closer connected with this matter, and that is the case of Kupoff, et al., v. Stepovich, which was appealed to the Circuit Court of Appeals, and I think that that opinion certainly sweeps aside the argument of counsel in this [194] case.

Now, your Honor, I believe that Mr. Cole would say that if you were a farmer and you were planting wheat and you were plowing that that farmer would be operating at a loss all the time, operating at a loss, because from the time he started his operations he didn't start to take in money while he was preparing the soil or while the seed was germinating or while the wheat was growing up, but when he harvested then he might show a profit.

Mining is something similar to this, to farming, because there is always a certain amount of dead work that has to be done before you can reach the harvest or you can bring anything in. In this case, your Honor, five and one-half months were devoted to what they call dead work, although in cleaning out the tunnels and driving and cleaning up the tunnel from here to here (indicating) and then driving from here over into here they did wash the gravel and recovered approximately \$3,400. That was a side issue, but it wasn't the main issue because they knew, Mr. Zukoev knew from working down here for Mike Stepovich a couple of years before that there was a rich pay streak in here. That was why they were willing

to pay  $33\frac{1}{3}$  percent royalty on that, and that is why Mike Stepovich exacted the  $33\frac{1}{3}$  percent royalty, because he knew that there was a high-grade or a rich pay streak there, so this, your Honor, from the time they cleaned that shaft out and over here and then [195] over here (indicating) at Mr. Stepovich's suggestion, he said there was a rich hole. What he wanted to do was guide them away from this side and have them extend their energies the other way, but they did come back over here and did strike it.

Your Honor, we had the drill logs here yesterday, but over the objection of the defendant he excluded the best evidence we could possibly have, your Honor, as to the value of that ground.

Now we have to take the next best evidence, and that is the evidence of experienced miners, such as Mr. Zukoev, Mr. Kupoff, who for years have been engaged in that line of business, and I dare say that lots of the miners of Alaska who have followed placer mining can sample and can test ground and they will arrive within a few cents of what an experienced mining engineer will say is the value of the ground. They can take a piece of quartz and brush it up and pan it out and tell you how much it goes to. They can take the gravel as it goes through and test it.

In this case, your Honor, the testimony is that when they hit this pay strike they knew that they were on it, because then they go 30 feet from the shaft each way. They opened up a face on this

pay streak here 60 feet wide, and from then on they started their thawing of the ground and, as they said, they tested, they panned and panned and panned all the time and [196] never got less than fifty cents a pan, your Honor, and seventy-five and one dollar and more than a dollar. They were on the true pay streak, your Honor, and Fairbanks as a mining center of Alaska has seen hundreds of those pay streaks, your Honor, a pay streak that where one time in the past a stream has run through and deposited the gold in that stream, and which in time the stream has filled up, the overburden come in, and the course of the stream is changed. So there is a possibility, and the jury can take that possibility into consideration, your Honor, that this pay streak runs along that way, your Honor, along where that line shows, and that pay streak can run over clear to the western boundary of that line, your Honor. It can run over to the northern boundary of the line or it can run down to the southern boundary of the line, but it has been prospected down this way (indicating), and probably this streak has turned in some other place. Pay streaks do not always follow straight lines. It may wind like a creek, to and fro, but if they are on it they can usually follow it. So I don't think that Mr. Cole's contention as not having any evidence, your Honor, as to the value there, we certainly have the value. We have shown it and they have shown nothing to the contrary. I think I contended and the evi-



dence shows that 51½ months of their operations there, your Honor, were, as they said, dead work and it is testified to by Mr. Kupoff and by Mr. Zukoev that that was done. [197]

It is not too problematical about the gold that was in the sluice box. Somebody took that gold. We will assume that Mr. Stepovich took that when he evicted these people off of the ground.

Another thing, your Honor, I think that is one of the strongest points in this testimony here as to the value of this Eastern Star Claim is the fact, your Honor, that United States Smelting, Refining and Mining Company before the lease that Mr. Kupoff and Mr. Zukoev had on that property had expired leased that ground from Mike Stepovich for fifty years and it is now under lease to the mining company. They are not going to lease a worthless piece of ground because they are not raising cattle, they don't need it for cattle grazing or raising wheat, because they want what is down underneath there. That is evidence of that, too, your Honor.

Now, I believe, your Honor, that the damages can be shown as to everything that was spent by these men or what they could have earned, should have earned, where the eviction of these men from that mine was wrongful. Absolutely, your Honor, abuse of process, using the Courts for the purpose of putting these people off the ground and keeping them off the ground until the cold weather came and the whole works had frozen up again so they

could not re-enter. Absolutely barred from it, just the same as they put soldiers out to guard it. There is no use going back because they would have had to do over [198] for a period of five or six months the same thing they had done before.

I think, as the Circuit Court of Appeals said, that the plaintiffs should be allowed to put on their evidence, and they criticized the specious objections that were made at the previous trial of this case, and I am relying, your Honor, upon the statement of the Ninth Circuit Court of Appeals that we have shown now exactly what they expected be shown.

The Court: Do you wish any rebuttal?

Mr. Cole: I would like to say that there is no evidence any place that Mr. Stepovich cleaned up those boxes and it hasn't even been inferred, and if he did it is conversional and had nothing to do with this action, because that is barred by the Statute of Limitations long ago.

They are suing for loss of damages, for breach of a covenant of quiet enjoyment, and they haven't shown, incidentally, that gold has a continuity. I think that is very essential to show that there was more gold in the ground. For all we know, unless the Court can take judicial notice of placer formations, but I think if the Court did take judicial notice of placer formations it would find that that type of evidence is very, very untrustworthy as to the future gold-bearing content of the ore. So there is no evidence that there is any gold-bearing,

profitable ore beyond actually where they did operate their mine. Even conceding that, there is no evidence [199] of expense, and there certainly must be some evidence of expense that it is going to cost to take the gold out of there, and be able to show that they could have operated at a profit. Just none of the elements are there, your Honor.

The Court: Mr. Taylor, I believe I understand, in paragraph nine of your complaint, that you do set forth an action for loss of prospective profits in the sum of \$100,000. That is your theory, is it not.

Mr. Taylor: Yes.

The Court: And what is the theory with reference to the \$6,791.29 set forth in the preceding paragraph? What I have in mind is if your clients recover their loss of profits, would that not include the \$6,791 for expense, which would reduce their profits, would it not?

Mr. Taylor: Mr. Stepovich got part of that money, your Honor.

The Court: What is that?

Mr. Taylor: Mr. Stepovich got part of that money, your Honor, and I think we were going to deduct the wages out of it, but I think the groceries and meats——

The Court: What is the theory of recovery? If your clients recovered their loss of profits in the whole mining venture, isn't that all that would be expected to recover?

Mr. Taylor: No, sir. We expected to recover

that which we had expended, which we had carried to a point and then we [200] were stopped, your Honor, from going any further, and by being stopped we lost what we had put into it, also lost what we expected to take out of the mine.

The Court: Yes, but if you hadn't been stopped and you had processed the mine, you would certainly to determine the net profit deduct the expenses, would you not, from the gross take?

Mr. Taylor: Yes, but we were not allowed to do that, your Honor. If we were not allowed to do that, we expect that we should get those back.

Now, under the Federal Rules of Civil Procedure, your Honor, our statement of the case, we set up certain things that were done, certain matters of expense, and then under that, any theory of law that will allow us to recover, your Honor, the jury can bring in a verdict to that effect.

The Court: Certainly. All I am asking is: what is your theory?

Mr. Taylor: Our theory is, your Honor, that we should recover all the money that had been paid out by these men.

The Court: Plus the loss of profits?

Mr. Taylor: Plus the loss of profits, whatever this jury may think the loss of profits are. If it is \$25,000, why, it would be \$25,000 plus or expenses, because the loss of profits, your Honor, would also mean, if the loss of profits was \$30,000, that Mr. Stepovich would have received \$10,000 of it. [201] The defendant would have been recom-



pensed, too. If \$30,000 was taken out, only twenty would go to the plaintiffs and ten would go to Mr. Stepovich. It wouldn't be all profits, your Honor. You would pay the royalty. Besides you would pay the cost of operation.

The Court: Yes, and from the gross amount of gold taken out of the mine, the plaintiffs would be expected, would they not, and intended to pay the defendant the royalty and expected to pay all expenses?

Mr. Taylor: Yes, your Honor, but they were not allowed to do that. They were stopped.

The Court: No, but you are now suing for the loss of profits?

Mr. Taylor: Yes, sir.

The Court: I can't understand your theory, why you expect to recover both your loss of profits and your expenses incurred.

Mr. Taylor: Your Honor, these expenses were for preliminary work. It wasn't the actual mining operations. It was the preliminary work, to open it up so it would be put in a state that it could be processed.

The Court: It was part of the expense in attempting to recover the gold, was it not?

Mr. Taylor: To get where the gold was, your Honor.

The Court: Yes. [202]

Mr. Taylor: I believe we are entitled to both of them. I know the Circuit Court of Appeals did not raise that question. I don't know whether

Mr. Hurley did or not in the case but they have commented quite freely upon it and I think that the matter should go to the jury for whatever theory that they could see that would allow us to recover, because, your Honor, that amount of money that the plaintiffs have paid in is a total loss to the plaintiffs at this time.

The Court: Yes, but they are suing to recover the loss of profits and, if they recover the loss of profits, this wouldn't be a total loss, if they were able to prove loss of profits.

Mr. Taylor: If the jury would say that there was a profit, an anticipated profit of \$50,000, they could deduct the \$6,000, if the Court wants to look at it that way. The Circuit Court of Appeals hasn't looked at it that way.

The Court: I want to look at it in a logical way and see whether I have here anything to submit to the jury. You still believe, do you, Mr. Taylor, that your clients are entitled to the \$6,791.29, plus the loss of profits?

Mr. Taylor: Yes, I sure do.

The Court: You don't think the expenses should be deducted from the gross?

Mr. Taylor: From the gross amount, yes, I would say they might be, if they said there was \$50,000 loss. It is all up to [203] what the jury would say was the profits. That is a matter for the Court to instruct the jury on.

The Court: How do I instruct the jury if I don't have your theory?

Mr. Taylor: I am stating emphatically, your Honor, that my theory is that we are entitled to recover more than we have alleged in there, \$6,700. I am going to move to amend the complaint before the case is over, because we have shown more than that, and I am going to ask to amend for the anticipated profits which would have accrued if we had been allowed to continue with the mining operations. But leave it up to the jury. If they feel that the cost of developing the mine up to the point of production is an expense that should be deducted from the anticipated profits they allow, that is a matter——

The Court: Do you think that is for the jury to decide, whether or not the expense of developing it should be deducted from the gross?

Mr. Taylor: I think the Court could instruct the jury on that. I contend strongly that we have lost the six thousand dollars. I am going to move to amend that to show more, before it goes to the jury, because I think we can show a greater amount than that.

The Court: Let's assume, Mr. Taylor, that the jury should find that if it had not been for the act of the defendant that [204] the plaintiffs would have taken out of the mine \$150,000 worth of gold.

Mr. Taylor: Yes, sir.

The Court: Now, do you think, in addition to that, they should bring in a verdict for the \$150,000 plus the \$6,791?

Mr. Taylor: No, sir.

The Court: Then what is your theory?

Mr. Taylor: I think they should bring in a verdict for \$100,000 plus the costs.

The Court: Do you think, then, that the plaintiffs are entitled to recover their share of the proceeds, plus their expenses in operation?

Mr. Taylor: No, if they had been allowed to proceed, no, I don't think that they would have, but the wrongful acts of the deceased was the reason that we asked for the compensation for his compensatory damages, your Honor, which might include both of them. I am not sure.

The Court: Well, I wish that I could see this case as clearly as counsel for plaintiff seems to see it. I have read, of course, and re-read the Ninth Circuit Case in the first trial, and I am mindful of the fact that the Ninth Circuit wanted these plaintiffs to have their day in Court, wanted them to have a fair trial, and that is what the Ninth Circuit Court and any other Court wants all litigants to have, is a fair trial. [205]

In that case, the Ninth Circuit concluded that the trial had not been fair, and it was sent back for re-trial, and the case has been retried on the part of the plaintiffs. And while the plaintiffs' evidence was being unfolded, I was careful in trying to figure out what do I have to submit to the jury, what instructions do I give the jury to aid them in bringing in a just verdict.

I think it is fair to say that there is a great chance that these plaintiffs have been damaged,



and maybe seriously damaged, but the determination does not stop there, if that were to be determined. Once the liability is established, then we must go to the question of damages, and when we come to the question of damages, I have very grave doubt whether the evidence is such that I can give the jury anything to work with. I don't think that I can say to the jury, "You heard the evidence; just go out now and figure how much the plaintiffs are entitled to recover. Just make a guess."

There is nothing in this evidence to show how deep the so-called pay streak went into the ground, no way of measuring the size of it from the evidence. How can the jury say: "Why, had they been permitted to proceed, they would have extracted so much gold from that pay streak." How could they arrive at an amount of gold, and if they did, which I don't believe they can, how would they then determine the expense of extracting it and refining it and getting it to market? [206]

Mr. Taylor: If the Court please, I would like to set the Court right. There is no expense of refining. That gold comes out as pure gold.

The Court: There is some expense to washing it or sluicing it, or whatever you want to call it. Perhaps "refining" is the wrong word, but there is some expense certainly in recovering it. It is there in the hillside or in the ground. It must be gotten out. Surely I would like it if I had something to submit to the jury, but I don't know

what it could be except, as I said, to just let the jury take the whole facts and say, "Well, these plaintiffs seem like nice fellows and they worked hard out there and they surely are entitled to something, and then let them speculate as to whether it is \$5,000 or \$100,000. There is not evidence, in my opinion, upon which the jury could intelligently base a verdict, and of course that is terribly troubling to me, but because I was in hopes there would be something here that the jury could pass on——

Mr. Taylor: If the Court please, could I just interpose something?

The Court: Certainly.

Mr. Taylor: You mean, is the Court entirely discrediting the testimony of Mr. Zukoev and Kupoff as to the value in that pay streak?

The Court: Certainly not. [207]

Mr. Taylor: That they had taken out a block of ground there that the estimate of the pay was from fifty cents to a dollar or more per pan, and that they had taken one thaw of 12 feet out and they had another thaw of 12 feet that they were prevented from taking out. That requires no supposition or conjecture on the part of the jury, your Honor. That stuff was there and they tested, they panned every foot as they went into it.

The Court: I understood they panned the surface. They drew the crowbar down, or the pick axe down the surface and got samples in that manner.

Mr. Taylor: Six foot up and down, so they would have a fair sample and every day they would pan, time after time they were panning there, your Honor. And that thing is just as well tested right now as if a mining engineer had done it.

The Court: Do you contend they tested it beyond the surface?

Mr. Taylor: No, but the surface receded as they did it.

The Court: How deep did the vein go?

Mr. Taylor: There is no vein, your Honor. There is no vein.

The Court: How deep did the gold-bearing gravel go, according to the evidence?

Mr. Taylor: They were taking six feet so they could get [208] a fair sample, and start and come down and mix the lean gravel with the rich.

The Court: How far back, then, did it go, Mr. Taylor?

Mr. Taylor: They went, as that face receded, as they removed it, every few hours they would take a pan, constantly panning. That is the testimony.

The Court: According to the evidence, what is the area of ground carrying this gold? What is the area of the ground?

Mr. Taylor: They had it opened up on the face to 60 feet wide. Jimmy said it was 62. Nick said it was 60. Jimmy was working down in the dump and Mr. Kupoff was working above.

The Court: That is correct.

Mr. Taylor: And he put in a thaw. They

thawed a little over 12 feet. They removed that and then they put in another thaw and they panned there. They panned the same way so they would get a fair estimate.

That, your Honor, is the accepted and usual way of testing placer ground in drift mining, and it has been for many, many years, and it is accurate, and I think that method is accepted. We had the drill logs, your Honor, to show that.

The Court: We can't talk about something we had here that is not in evidence and might have been helpful if it had been in evidence, but we must deal with the evidence that we have now, that we do have in evidence. What is the evidence, Mr. Taylor, [209] that we do have as to the quantity of the gold-bearing dirt?

Mr. Taylor: Your Honor, the quantity we know that there was taken out from that (indicating) place was 60 feet long, 12 feet wide, and 6 feet deep. That was a matter of 4,320 cubic feet. That was 170 yards. Also then in the face after that was removed, and they tested the next face of it and put the steam pipes in again, they pounded them in, and this next block they were still in the pay streak ground, so you could say it was 24 or 25 feet wide, 60 feet long, and 6 feet deep. But then, the way pay streaks run, that pay streak could, your Honor, run on to the northerly boundary.

The Court: Surely, it could.

Mr. Taylor: The jury can decide.



The Court: It could go back, I suppose, miles underground, but I don't know what that has to do with it.

Mr. Cole, I have permitted counsel to argue evidentiary matters. I would be glad to hear from you as to what the evidence shows concerning the quantity of the gold-bearing gravel, as shown by the evidence.

Mr. Cole: There is clear testimony that they operated clear down through here (indicating), and so forth, and then came back and started mining in this area (indicating). There is some testimony that they took some pans down there. They never weighed them, incidentally. Just look at the gold and tell how valuable it is in the pan, apparently.

There is testimony that they were mining in this area here (indicating) shown on their exhibit and Identification Exhibit B, and there is testimony that they had taken some of that out and they sluiced it, but there is no actual evidence as to how valuable this ground was, any more than their testimony of their panning, but they had sluiced some of it and they had also had a clean-up on August 8th. That is shown in the record, here and there, and Exhibit S shows they had a clean-up and deposited approximately \$1,300 on August 8th.

You will recall Mr. Zukoev's testimony that they hit this so-called rich pay, he said, the first part of June.

The Court: Yes, he changed his testimony.

Mr. Cole: And then he changed his testimony

and said some time in July and they had twenty days in there they were working and sluicing and they came out with twelve hundred and thirteen hundred dollars. So the query is just how valuable this really was. But they don't go on and say, they have never shown for one moment that any of this area lying beyond the face which they had exposed contained gold—not only contained a little gold, but contained gold.

There is no evidence of drill holes or any samples beyond just exactly what they had exposed, so how is it possible to know whether there is gold laying the next foot back?

There is no testimony that they would have stopped operating had they found it. The only testimony is that they say they [211] found some—really what it is, when all terminology is cast aside, they found some better ground than they had found in their operations in the prior months of that mining season.

There is no evidence that it is rich pay. They testified that it is just a little better ground. That is what it amounts to, and when you cast aside their common terminology of pay streaks and rich pay, it is no more than they found a little better pay than they had been finding. I hope so, because they had been operating at a tremendous loss until they found this area. But there is certainly no testimony that any place, even that this gold right here (indicating) was profitable. There is no set-off of this gold right here in this area with the expense of

mining the gold in this area. We don't know whether this was profitable even, and we certainly, as the Court pointed out, don't know that there was any gold whatsoever lying beyond that which they had actually exposed, much less the cost of excavating any gold which they had not exposed, and how anyone can figure profit and loss without even knowing the amount of the income, and I use the income in the profit and loss sense—gross income, how you can determine profit and loss without knowing gross income and expense, is beyond me, and I think it is nothing but a pure, out-and-out guess as to whether they would have made one red dime even in the area they were mining so-called rich pay or the area which they hadn't exposed.

I think it is quite proper to strike their claim for any——

Mr. Taylor: Your Honor, may I point out——

Mr. Cole: I also, I don't think it is necessary to comment on the many things, your Honor, which Mr. Taylor talks about which aren't in the record, such as the F. E. and mining and leasing the ground and those things that are extraneous, so I won't even comment on them.

Mr. Taylor: If the Court please, I did want to comment upon this deposit that was made on August 8, 1946. That clean-up was made considerably before that, because that was the clean-up which Mike Stepovich took and brought to town and Mr. Zukoev had to come in town to get a lawyer to get the——

The Court: Is that in the evidence, Mr. Taylor?

Mr. Taylor: Yes, sir. He came to town and to get the money and then put it in the bank. Mr. McGinn, the attorney, made Mr. Stepovich, so that clean-up was considerably prior to the 8th of August. The deposit was the 8th of August, but Mr. Stepovich had brought the money in and was not giving it to them.

The Court: What year, Mr. Taylor?

Mr. Taylor: 1942.

The Court: You said 1946.

Mr. Taylor: No, 1942, your Honor.

The Court: No wonder I was confused. [213]

Mr. Taylor: Mr. Stepovich was dead in 1946.

Mr. Cole: As the Court knows, there is no such evidence in the record.

Mr. Taylor: Then, also calling the attention of the Court to the testimony of Mr. Zukoev and Mr. Kupoff that when they got 12 feet in there that the pay was getting better. That is their testimony. Fifty cents a pan, which is the lowest they claimed they were getting at that time. A pan is a shovelful. There are several shovelfuls to the cubic foot, 27 cubic feet to the yard. At 50 cents a pan, it would be \$94.50 a cubic yard, your Honor. If they couldn't make a profit with that—but they said lots of pans were 75 cents and a dollar and the pay was getting richer as they got in. I think that we have shown a very high value on it. I think that 50 cents a pan, your Honor, is considered in this country to be exceptionally rich ground.



Mr. Cole: There is not one shred of evidence as to how much it cost them to move one yard.

The Court: In answer to one of Mr. Taylor's questions whether the Court was disregarding the testimony of the two plaintiffs, Mr. Kupoff and Mr. Zukoev, I say certainly not, and I have no reason to, and I don't doubt their testimony in any respect, and for this particular motion I am certainly assuming as correct and believing that the plaintiffs' testimony as to the value of the ore that they panned ranging from 50 cents to \$1.80 per shovelful or panful, I am believing that to be true. [214]

Mr. Taylor: Your Honor, I don't like to object, but this was not ore, your Honor. This is frozen gravel and dirt.

The Court: Frozen gravel and dirt, and I suppose there is some gold in it, too?

Mr. Taylor: No ore.

The Court: No gold?

Mr. Taylor: Gold, yes.

The Court: You just said frozen gravel and dirt. I was just wondering. Perhaps gold, too?

Mr. Taylor: Yes, your Honor. I thought it might be misleading to use the word "ore."

The Court: I am sorry if I misused the word "ore." I suppose if you said that actually what it contained was dirt and gravel, that that isn't correct either. It contains more than dirt and gravel allegedly.

So what I am trying to do is see whether there is anything I feel I can possibly submit to the jury

and, if I can, I am going to do it, but right now I would have no notion of how to instruct that jury.

Mr. Taylor: Your Honor, possibly respective counsel could submit requested instructions.

The Court: Do you have any requested instructions ready at this time?

Mr. Taylor: I haven't right at this time, your Honor. [215]

The Court: Did you file a trial brief in this case?

Mr. Taylor: There have been so many briefs filed in the case I didn't believe there would be much necessity for any more.

The Court: Those things would be very, very helpful to the Court.

Mr. Taylor: I don't think I did, your Honor.

The Court: I am going to reserve decision on the motion. We have been in session for an hour and twenty minutes, and we will take a 10-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

(The jury was brought into the courtroom and took their places in the jury box.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, I have some remarks that I want to make in the absence of the jury but the jury is now in the box. Will counsel please approach the bench?

(Thereupon counsel approached the bench,

and the following ensued out of the hearing of the jury):

The Court: I am of the opinion that there is great merit to the defendant's motions, but in view of the gravity of the situation I am going to reserve ruling and in the meantime I am trying to figure out what I might submit to this jury on the evidence that is so far in the record. It is fraught with problems, as far as I am concerned. As I say, I feel that I should grant the motion, [216] but I am not going to at this time, at least.

(Thereupon the discussion at the bench was concluded, and counsel resumed their places at counsel table.)

The Court: Mr. Cole, are you ready to proceed?

Mr. Cole: Yes, your Honor. Call Vuka Stepovich.

### VUKA RADOVICH STEPOVICH

the defendant, took the stand in her own behalf, and after being duly sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Cole): What is your name, please?

A. Vuka Radovich Stepovich.

Q. And you are the widow of Mike Stepovich, Senior?

A. Yes, sir.

Q. And you are the defendant in this action?

A. Yes.

Q. How long have you been in this country, Mrs. Stepovich?

A. I came in 1929.

Q. Where did you come from?

(Testimony of Vuka Radovich Stepovich.)

A. From Jugo-Slavia.

Q. Is that where you were born?

A. That is where I was born.

Q. Where did you meet Mr. Stepovich?

A. In Jugo-Slavia. [217]

Q. Were you married there? A. Yes.

Q. And then he and you returned to this country? A. Yes.

Q. Where did you go when you first came?

A. I came here.

Q. Fairbanks? A. Fairbanks.

Q. Did you live here in Fairbanks at first, or where did you live?

A. Yes, for about one month.

Q. And then where did you go?

A. We went to the low end of the Fairbanks Creek.

Q. You went to Fairbanks Creek after you came here? A. Yes.

Q. What year was that? A. March '29.

Q. Was that where Mr. Stepovich was living?

A. Yes.

Q. And where is Fairbanks Creek from here? Just how do you get there?

A. You go to Summit, 20-mile Summit on the Steese Highway, and then you go right and go maybe eight to ten miles.

Q. Down to the creek? [218]

A. Down to the Fairbanks Creek.

Q. How long did you live out there?

A. I lived here and there for about six years.



(Testimony of Vuka Radovich Stepovich.)

Q. Out on the creeks?

A. Out on the creeks.

Q. With Mr. Stepovich?

A. With Mr. Stepovich.

Q. Did you live there the year around?

A. Yes, for six years I lived out at the creeks all the time. I just come for a visit in Fairbanks.

Q. When did Mr. Stepovich come over to this country?

A. I am not exactly sure when, but it was sometime in 1894 or 1895, something like that.

Q. Where did he first go when he came to the United States?

A. Fresno, California, he came first.

Q. And where did he go from there?

A. He went to Dawson with the other gold prospectors.

Q. What year was that about?

A. I couldn't tell you that—1897 or 1898.

Q. What did he do over there in Dawson?

A. He did mostly freighting there. He had lots of horses and sleds and he did some mining, not very much. That was his story that I usually hear all the time in talking with the other old-timers.

Q. And then what happened over there?

A. He lost all his horses from the sickness and he had only one mule left, and then he heard about the Fairbanks strike, and he had one mule and one horse, and he came in Fairbanks——

Mr. Taylor: Just a moment. For the sake of saving time, I am going to object to the narrative

(Testimony of Vuka Radovich Stepovich.)

of something that happened many, many years ago, before Mrs. Stepovich came up here.

The Court: I will allow a reasonable latitude in the foundation or preliminaries, but maybe you are going a little far.

Mr. Cole: I am just bringing Mr. Stepovich into this area.

The Court: Proceed.

Mr. Cole: Yes.

Q. (By Mr. Cole): So then what happened?

A. He came in this country and he went out to the Fairbanks Creek and he owned some property there, on Seven Below, and mining there, and I think the cabin is still standing there, but he sold it to the English Company and then he moved to the lower end of the Fairbanks Creek and he mined there before he came to the old country.

Q. And you two began living out there about 1929? [220]      A. 1929.

Q. Did you and Mr. Stepovich have any children?      A. Yes.

Q. And how many?

A. Four children. My older boy is in Wisconsin now taking dentistry, and my younger boy also taking dentistry in San Francisco. My one daughter is a kindergarten teacher in California, and my young daughter is a junior in college.

Q. Where were these children born?

A. They were born in Fairbanks. It happened they were born in a log cabin at Fairbanks Creek.

Q. Where you were living?

(Testimony of Vuka Radovich Stepovich.)

A. That is where I was living.

Q. How long did you live out there then? Six years?

A. I didn't live there all the time. I lived one year on the tungsten mine, head of the Gilmore Creek, about fourteen miles from town.

Q. When did you come into Fairbanks to live?

A. In 1936, when my older boy was old enough to go to school.

Q. You lived in town during his school year?

A. Yes. In the summertime we go out to the creeks.

Q. Mr. Stepovich was mining on the creeks all this time?

A. Yes, here and there, prospecting and mining.

Q. Do you know where the Eastern Star Mining Association claim was?      A. Yes.

Q. Where was that?

A. It was right here on Fish Creek. They call it Slippery Gorge.

Q. Is that the confluence of Slippery Gorge Creek and Fish Creek?

A. Yes, Slippery Gorge goes into Fish Creek.

Q. How far did you live from that?

A. My last home was maybe nine and a half.

Q. Were you ever on this Eastern Star mining claim?      A. Yes.

Q. Do you recall the mining season of 1941, Mrs. Stepovich?      A. Yes.

Q. And did Mr. Stepovich mine that year?

A. Yes.

(Testimony of Vuka Radovich Stepovich.)

Q. Where was he mining?

A. In the Eastern Star.

Q. Eastern Star?            A. Yes.

Q. During that time that he was mining there, were you ever on the claim? [222]

A. Yes, in the summertime.

Q. How often?

A. Sometimes I wouldn't go there for a week and sometimes every day.

Mr. Cole: I would like to have this marked.

(The photograph was marked Defendant's Identification B.)

Clerk of Court: Defendant's Identification B.

Q. (By Mr. Cole): Mrs. Stepovich, I will hand you Defendant's Identification B and ask you to observe it, please.

Have you observed it?            A. Yes.

Q. Can you identify it?            A. Yes.

Q. What is it?

A. Oh, it is a gin pole and a dump and sluice boxes and buildings.

Mr. Taylor: Just a moment. I object to him showing it to the jury at the present time.

The Court: That is correct.

Mr. Cole: Very well.

Q. (By Mr. Cole): On what claim was that?

A. That is the Eastern Star.

Q. And is this the claim which Mr. Stepovich leased to the plaintiffs?            A. Yes.

Q. Is it a true and accurate representation of the claim and what appears on it?



(Testimony of Vuka Radovich Stepovich.)

A. Yes, that I can see.

Q. You saw the claim in 1941? A. Yes.

Mr. Cole: I move its admission into evidence.

Mr. Taylor: We object, your Honor. It is a little remote, taken a year prior to the leasing of the property to these plaintiffs.

The Court: It will be received.

Clerk of Court: Exhibit No. 1.

(The photograph previously marked Defendant's Identification B was received in evidence and marked Defendant's Exhibit No. 1.)

Mr. Taylor: For what purpose, your Honor? I would like to know for what purpose it is received.

The Court: It depicts, according to the witness, the condition there at the mine in the year 1941.

Mr. Taylor: I still renew my objection as incompetent, irrelevant and immaterial, has no bearing upon the issues as to [224] what took place in 1942.

Mr. Cole: This is Defendant's Exhibit 1 (showing the photograph to the jury).

Q. (By Mr. Cole): Do you know where the shaft was on this claim?

A. It is right behind that building. It is about ten feet maybe from the boiler house.

Q. Now, is this the boiler house here?

A. Yes.

Mr. Taylor: I object to any further questions unless they show that this is the only shaft on the ground. There has been testimony that there were several other shafts.

(Testimony of Vuka Radovich Stepovich.)

The Court: I think if you will have the witness spell out as to the time, you may proceed.

Mr. Cole: Yes.

Q. (By Mr. Cole): Where was the shaft that Mr. Stepovich mined from on this claim in 1941?

A. It was right here (indicating).

Q. Was that the same shaft which Mr. Stepovich leased to the plaintiffs in this action?

A. Yes.

Q. In February, 1942? A. 1942. [225]

Q. Did Mr. Stepovich mine during the mining season in 1942? A. No.

Q. Do you know why?

A. Well, I didn't want him to, because his health wasn't very good.

Q. What was wrong?

A. Well, he had a heart ailment for several years and he wasn't getting any better. I felt he was getting worse instead of better, and the doctor wouldn't permit him to do any work, physically or mentally. It was just a plain risk.

Mr. Taylor: Now, just a moment. Your Honor, we are going to object to this line of answers to the questions. I think that it calls for a conclusion, conjecture, supposition, and hearsay.

The Court: I will permit it to stand so far. You may proceed.

Q. (By Mr. Cole): Now, did you go out to Fish Creek in 1942? A. Yes.

Q. What part of the year?

A. That year I didn't get out before July.

(Testimony of Vuka Radovich Stepovich.)

Q. Why was that?

A. Well, my boy was sick and then we lost a house in the fire. There were so many things that I couldn't leave [226] Fairbanks very well.

Q. When did you come in from the claim, in from Fish Creek, in 1942?

A. In September, when the school started.

Q. Do you know what time in September? In the early part, or middle part?

A. I think it was the first part of September, as much as I can remember.

Q. And how long did you remain here in Fairbanks?

A. Well, we left, all family, for "Outside" on October 8th.

Q. Did Mr. Stepovich go with you?

A. Yes. I am not really positive of the date of October, but that was always in my mind that we left on October 8th, but maybe I am mistaken right now, but it was the first part of October that we left Fairbanks.

Q. Did Mr. Stepovich ever tell you anything about this lease which he had entered into between him and the plaintiffs in this action?

Mr. Taylor: Just a moment. We object, your Honor; it would be hearsay and self-serving, not admissible.

The Court: I have in mind the particular Territorial Statute that seems to authorize this testimony.

(Testimony of Vuka Radovich Stepovich.)

Mr. Taylor: The lease speaks for itself, too, your Honor. [227]

The Court: But I will permit the answer.

Mr. Cole: Will the reporter please read the question to the witness?

(Thereupon the reporter read the last question.)

The Witness: Yes.

Mr. Taylor: I think I am going to object, your Honor. The proper foundation has not been laid to show that she is familiar with the terms of the lease. I think that should be shown first, your Honor, and I still renew my objection to hearsay testimony which would be self-serving in this case and is not admissible as evidence, your Honor, under any rule of law that I know of.

The Court: Are you aware of the Territorial Statute?

Mr. Taylor: I would sure like to see it, your Honor. I move we take a recess at this time. It is just twelve o'clock.

Mr. Cole: Your Honor, I think we could finish the direct-examination of this witness if we had three or four minutes. I will be happy to read the statute to Mr. Taylor at this time if he wants me to.

The Court: Do you have it handy to read?

Mr. Cole: Yes.

Mr. Taylor: I would like to read the statute and not from that book, Mr. Cole.

The Court: You may proceed.



(Testimony of Vuka Radovich Stepovich.)

Mr. Cole: Will the reporter please read the question again? [228]

(Thereupon the reporter re-read the last question.)

The Witness: Yes.

Q. (By Mr. Cole): What did he say?

Mr. Taylor: Just a moment, your Honor. The proper foundation has not been laid as to when and where and who was present at that conversation. It is too indefinite in point of time and place.

The Court: Very well. Objection overruled. She may answer.

Q. (By Mr. Cole): Mrs. Stepovich, what did he say?

A. Well, he said that, I asked him, first, "What is the matter?" I can see on him that something was worrying him, and he said that he believed that the boxes, they were touched before the clean-up. That means that somebody was touching the gold that was in the boxes.

Q. Then he went "Outside" in October?

A. Yes.

Q. Where did you finally reside?

A. We came to Seattle and stopped about a week and then we left for California and we lived in San Diego, stayed there for the Christmas vacation, and we bought a car and we drove up to San Jose, California, and stayed there for a week, and then [229] before the New Year we moved to Los Gatos, California, put the kids in school and bought

(Testimony of Vuka Radovich Stepovich.)

a home and that is the home that I am living in now.

Q. And in what year did Mr. Stepovich pass away?      A. In 1944, in September.

Mr. Cole: That is all, your Honor.

The Court: It is twelve o'clock. We will take the noon recess. Mr. Hall, do we have anything at 1:30?

Clerk of Court: Yes, we do, your Honor.

The Court: Very well. This case will be resumed at two o'clock and Court will recess until 1:30. The jury will please heed the admonition I have previously given you.

Clerk of Court: Court is recessed until 1:30. This case is recessed until 2:00 o'clock.

(Thereupon the trial of this cause recessed at 12:00 noon, to resume at 2:00 p.m.)

Clerk of Court: Court is reconvened.

The Court: Are the parties ready to proceed?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant is ready, your Honor.

The Court: Very well.

Mr. Cole: I would like at this time, your Honor, to ask permission to examine Mrs. Stepovich for another question or two.

The Court: Yes. She hasn't been turned over for [230] cross-examination yet.

Mr. Taylor: No.

Q. (By Mr. Cole): Mrs. Stepovich, in Defendant's Exhibit No. 1 there appears a large white

(Testimony of Vuka Radovich Stepovich.)

mass approximately in the center of the picture. Do you recall seeing that in 1941 when you were there?

Mr. Taylor: Just a moment. Your Honor, we are going to object because it has no bearing upon this case. None of the plaintiffs had any connection with that property in 1941.

The Court: I will permit her to answer to establish the condition as of that time. If you want to come over here, Mr. Taylor, you have a right to.

Mr. Taylor: No.

Q. (By Mr. Cole): Do you recall seeing this there in 1941?

A. Well, I don't think so, no, not in 1941.

Mr. Cole: That's all.

Your Honor, I wish to point out that this Exhibit 1 of the defendant is not introduced for the purpose of showing that this particular mass which appears here in white was on the dump in 1941. It is introduced for the purpose of showing the general nature of the terrain surrounding the claim, the fact that the boilerhouse appears on it, and another house, the gin pole and the sluice boxes. That is the sole purpose for its submission at this time. [231]

You may take the witness, Mr. Taylor.

#### Cross Examination

Q. (By Mr. Taylor): Mrs. Stepovich, how many shafts were there on the Eastern Star Claim?

A. What I can remember——

(Testimony of Vuka Radovich Stepovich.)

Q. What?

A. What I can remember, there are three shafts.

Q. There are three shafts. This picture was taken in 1941, was it?

A. I don't know when it was.

Q. What?

A. I don't know when it was taken.

Q. You don't know whether it was taken in 1941, then, or not?

A. I don't know when the picture was taken.

Q. And isn't it a fact at the other shafts they had a boiler house and a gin pole also?

A. Yes.

Q. What is that white mass that shows up there? Do you know what that is?      A. Yes.

Q. What?

A. It must be dirt from under the ground.

Q. Do you know what part of the claim this is on?

A. Well, I recognize the boiler house and I know where [232] the boilerhouse is and I approximately know where the dump is.

Q. And what shaft is that, Mrs. Stepovich?

A. The third shaft.

Q. The third shaft?      A. Yes.

Q. And in 1941 was that dirt—was that put through the sluice box?      A. No.

Q. What?      A. No.

Q. When was it put through the sluice box, or was it ever put through the sluice box?

A. In 1941?



(Testimony of Vuka Radovich Stepovich.)

Q. Yes, ma'am. A. Not that dump.

Q. What? A. You confuse me on the dates.

Q. Will you point out to me where the sluice boxes are there, Mrs. Stepovich, please?

A. This is the hopper and then you can see the box in the picture there.

Q. You see the hopper up here (indicating), don't you? A. Yes.

Q. And you don't see the sluice boxes though?

A. No. [233]

Q. And this dirt then had been piled in the hopper? A. Yes.

Q. Do you know whether that dirt and gravel was in the hopper in 1942? A. No.

Q. So you don't know whether this picture was taken, then, in 1941, or not, do you?

A. No.

Q. So it might have been 1938 when they were working there? A. Not in 1938.

Q. Or 1937, when Mr. Stepovich was mining there?

A. No. It was taken sometime either 1941 or 1942, because that is when we have the boilerhouse, that particular one.

Q. Wasn't that boilerhouse there in 1938 and 1939? A. No, not that one.

Q. Do you know when Mr. Erickson was operating on that claim? A. Yes.

Q. And did he use this boilerhouse——

A. No.

Q. ——and this gin pole?

(Testimony of Vuka Radovich Stepovich.)

A. No, not that boiler house. I don't know if he did use that particular gin pole. If he did, it was in another place.

Q. And do you remember when Mr. Tavitoff operated on the Eastern Star Claim? [234]

A. Yes, I remember when he operated, but I never been there.

Q. Do you know how much money Mr. Tavitoff took out there? A. No.

Mr. Cole: That is irrelevant, your Honor, and not proper cross-examination.

The Court: She has answered "No."

Q. (By Mr. Taylor): Do you know how much money Mr. Stepovich took out of this dump that shows here? A. No, I can't recall right now.

Q. Was this claim ever in your name, Mrs. Stepovich? A. On my name?

Q. Yes, was the title in this claim ever held in your name?

A. There was two claims on Slippery Gorge, but I don't remember if the Eastern Star was ever in my name.

Q. You are sure that this picture was taken at the time that Mr. Stepovich was operating on that claim?

A. I am sure that that shed and that boiler-house was built when he was in that shaft.

Q. Now, do you know how long the drifts were down below?

A. No, I never have been in a drift in my life.

(Testimony of Vuka Radovich Stepovich.)

Q. And do you know how far it was to the bottom of the shaft? [235] A. No.

Q. How long did Mr. Stepovich mine out of that shaft?

A. If I want to tell the truth, I can't remember.

Q. And you also cannot remember when this picture was taken? A. No.

Mr. Taylor: That is all.

#### Redirect Examination

Q. (By Mr. Cole): Mrs. Stepovich, this picture might have been taken at any time after 1941, might it not? A. Yes, any time after 1941.

Q. But you are sure that this is the boilerhouse and the shaft and the gin pole? A. Yes.

Q. And the other workings which were on the Eastern Star Claim?

A. Yes, on the last shaft that my husband sank on the Eastern Star.

Q. Did he lease this particular shaft?

A. He did.

Q. And area to the plaintiffs? A. Yes.

Mr. Cole: That is all. [236]

#### Recross Examination

Q. (By Mr. Taylor): That is one of three shafts that is on the ground, is that right?

A. Yes, that is what I remember.

Mr. Taylor: That is all.

Mr. Cole: That is all, Mrs. Stepovich.

(Witness excused.)

Mr. Cole: At this time, your Honor, I would like to read into the record portions of the official transcript of the record in the first trial of this action.

Mr. Taylor: Just a moment. Your Honor, we are going to object to that upon the grounds that we have been refused permission to read into the evidence the testimony of Mr. Ulmer. We moved to do that, your Honor, and I think the rules should apply the same to Mr. Cole.

The Court: There is no doubt the same rule should apply to all parties, but what is it you seek, Mr. Cole, and do you have the proper foundation?

Mr. Cole: I am reluctant to introduce the entire transcript.

Mr. Taylor: I will stipulate the entire transcript may be entered, your Honor.

Mr. Cole: I won't stipulate to that, your Honor. I am not going to put in the entire transcript of the earlier case.

The Court: Mr. Cole, you merely said what you want to do [237] is read a portion of the transcript into the record.

Mr. Cole: Yes.

The Court: I don't know that that is proper.

Mr. Cole: And I wish to introduce it as an admission of plaintiffs in this action, and it is admissible as an exception under the hearsay rule, and the testimony is being admitted under official records exception to the hearsay rule.

The Court: I think that you should spell out



whose testimony and under what circumstances you wish to use it.

Mr. Cole: Yes. I wish to introduce——

Mr. Taylor: Just a moment. Your Honor, I am going to object to him testifying now before a jury what he is going to introduce in evidence.

Mr. Cole: I didn't say what I was going——

The Court: I want to see whether he can lay the foundation for the exception to the hearsay rule that will permit the reading of a portion of the transcript.

Mr. Cole: Mr. Taylor, will you stipulate that is the official transcript of the testimony of the prior hearing?

Mr. Taylor: Yes, and I will stipulate also that the whole thing may be introduced into evidence.

Mr. Cole: I won't stipulate as to that, but I will accept your stipulation that this is the official transcript. I wish to make it clear at this time that I am not introducing this transcript in its entirety, only certain portions of the testimony [238] of Nick Kupoff, one of the plaintiffs, and that is being introduced—first of all, while his testimony is hearsay, it is admissible under the admissions exception to the hearsay rule, and I may introduce his testimony in this action through the official transcript, and that is a recognized exception to the hearsay rule.

Mr. Taylor: If the Court please, Mr. Kupoff has been on the stand. He could have been asked when he was up there as to whether he made pre-

vious statements. Such was not done, and I do not believe that it is permissible now to read a bare narrative of something out of the record, without giving Mr. Kupoff an opportunity to state whether or not he has made those statements.

The Court: For what purpose are you offering this, Mr. Cole?

Mr. Cole: Substantive evidence of the contents of the statements.

The Court: You are not offering it for impeachment purposes, as suggested by counsel?

Mr. Cole: No, sir.

The Court: Because, Mr. Taylor, as I understand your objection, it is that he hasn't laid the proper foundation for impeachment purposes.

Mr. Taylor: That is right, too, and under any view of it, your Honor, unless we can introduce the whole thing, I don't think that the defendant can pick and choose. He can't take the ripe melons and leave the unripe ones lay. If he is going to [239] take the record, let him take the whole record, but if he is fearful of the whole record, lay out the whole record.

The Court: I don't think there is anything to require a party who seeks to put in a portion of the former testimony to put it all in. I don't think that is the law.

Do you have something else you can go on with when we have the jury here, and I can reserve ruling on this, Mr. Cole? I don't want to disrupt your plan of putting in the evidence. Is this the next thing that you would like to go into?

Mr. Cole: I think we perhaps may be able to take the testimony of one other witness before the admission of this, safely.

The Court: Very well, you may proceed with your witness, please.

Mr. Cole: I call Earl Beistline.

EARL H. BEISTLINE

called as a witness on behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cole): What is your name, sir?

A. Earl H. Beistline.

Q. Where are you employed, Mr. Beistline?

A. University of Alaska.

Q. How long have you been employed there?

A. I have been at the University of Alaska since 1946.

Q. In what capacity are you employed now?

A. My present capacity is Dean of the School of Mines.

Q. Have you been with the School of Mines since 1946?

A. Yes, first as an instructor, until 1949, and then in 1949 I was made Dean of the School of Mines, my present position.

Q. Are you married?

A. Yes, I am married to Dorothy Herring, a local girl.

Q. And do you have any children?

(Testimony of Earl H. Beistline.)

A. Yes, I have two sons and one daughter.

Q. Where do you live?

A. I live at Four Mile on the College Road, just east of the campus of the University.

Q. Have you had any formal training or education in mining and mining operations?

A. Yes, I have.

Q. And what has that been?

A. I graduated from the University of Alaska in 1939, with the five-year degree of Bachelor of Mining Engineering. In 1947 I received the degree of Engineer of Mines from the same University.

Q. What is required for the degree of Engineer of Mines?

A. Engineer of Mines is a professional degree, and one must have worked in the field for at least five years with jobs of responsibility, and in addition write a thesis on some phase [241] of his work during that time.

Q. Did you write a thesis for your degree?

A. Yes, sir.

Q. What was that thesis on, or its title?

Mr. Taylor: Just a moment. Your Honor, we are going to object as an unnecessary attempt to qualify this witness. I will stipulate that he is qualified as a mining engineer.

The Court: I don't know whether counsel wishes to rely on the stipulation or whether you wish to establish his qualifications.



(Testimony of Earl H. Beistline.)

Mr. Cole: I would prefer to establish his qualifications, your Honor.

The Court: You may proceed.

A. The title of the thesis was dredge sampling and clean-up procedure. The entire paper pertains to dredge valuations, placer-mining valuations.

Q. (By Mr. Cole): What practical training or experience have you had in mining and mining operations?

A. Prior to graduation in 1939 I worked for several placer-mining companies in this area. I had worked for the Alaska Juneau Gold Mine at Juneau. After graduation, I worked for the United States Smelting in their Fairbanks office for about two years. During that time I started out as a laborer, worked in the thawing, stripping, the dredging, was a mill man, and in 1941 I went into [242] active service. I remained in active service until 1946. At that time, I came back, worked for the Territorial Department of Mines for a short time, and then starting teaching in about March of 1946. The summer of 1946 I was dredge engineer and planner for the Brinker-Johnson Company, a placer operator located at about 100 miles east of Fairbanks.

Since that time, during the summer months, I have operated myself and I have worked for a number of companies in a consulting capacity.

Q. Are you a member of any professional organizations?

(Testimony of Earl H. Beistline.)

A. Yes, sir. The American Institute of Mining and Metallurgical Engineers, also a registered mining engineer for the Territory of Alaska, a member of the American Association of University Professors, the American Society of Engineering Education. There are two or three more, perhaps, but about the same type professional organizations within the fields of education and mineral industries.

Q. Are you acquainted with the various methods by which gold is mined? A. Yes.

Q. What are those methods, principal methods?

A. The mining of gold can probably be classified into two general forms: lode mining and placer mining.

Q. What is the reason for those two principal distinctions? [243]

A. Primarily the characteristic of the deposits. In other words, you have in lode mining a case where gold is in a solid rock, associated quite often with quartz.

Mr. Taylor: Just a moment. I am going to object to this dissertation. I don't believe that hard-rock mining enters into this case in any manner whatsoever. I think he should confine his dissertation to placer operations.

The Court: Perhaps this is his way of best explaining to the jury the placer operation to show the two different types.

Mr. Taylor: It is quite a long and circuitous way.

(Testimony of Earl H. Beistline.)

The Court: I think it is proper. He may proceed.

A. (Continuing) In lode mining, the gold is contained in solid rock. To recover the gold it is necessary to drill the rock, to blast the rock, to transport the rock to a recovery plant, such as a mill. In this mill crushing and grinding takes place, the gold is released and then recovered. Essentially, now, very briefly, that is what we mean by lode mining.

Q. (By Mr. Cole): And what about placer mining?

A. Placer mining consists of mining minerals or metals that are not in place. If we have a metal such as gold that is mixed with gravel, that gold has been transported to that position, the mining of that type of deposit is known as placer mining.

Q. When you say "not in place," what do you have reference [244] to, Mr. Beistline?

A. I perhaps could explain that best by drawing a sketch and showing the formation of a placer deposit.

Q. Very well. You may be permitted to.

Mr. Taylor: We object, your Honor. I believe these sketches have been ruled out here. I think he can verbally state what it is.

The Court: I don't know what sketches have been ruled out, Mr. Taylor, but I certainly will permit this demonstration.

Mr. Taylor: I object to it unless it is an illus-

(Testimony of Earl H. Beistline.)

tration of the placer operations, your Honor, on the Eastern Star Claim.

The Court: I understand the witness is about to give the general placer operation.

Mr. Cole: Yes, sir.

Q. (By Mr. Cole): Mr. Beistline, if you will just illustrate the general characteristic of gold, its location in a placer formation, and illustrate——

Mr. Taylor: Just a moment. Your Honor, to save time, I would move that he confine his illustrating to drift mine placer operations.

Mr. Cole: This is preliminary. We will do that, too.

The Court: You may proceed and, of course, Mr. Taylor, you will be given an opportunity to cross-examine.

Mr. Cole: Yes, indeed. [245]

The Court: Proceed.

A. What I am going to try to demonstrate here is the way that a placer deposit is formed, whether it be drift mining, bulldozer operations, or dredging, comes, if you have a full understanding of the formation of the deposit,——

Mr. Taylor: Just a moment. I am going to object to that, because that would be mere conjecture and conclusion, your Honor, as to how they are formed. I think if he shows how they are after they are formed, I will withdraw the objection. It would be just merely hearsay, something he has read out of a book, as to how they were formed.



(Testimony of Earl H. Beistline.)

I don't think it would be admissible in evidence, in this case.

The Court: He may proceed.

A. (Continuing) In the formation of a placer deposit, the first thing you have to have is a source of metal or mineral. You recall now the definition we gave of lode mining, where we would have a mineral deposit, and this could well represent now a mineral deposit, and this (indicating) a mountain, in a manner like so. Perhaps if you were to look at a mountain and a valley and imagine a plane cut vertically through, you would see the mountain here, and then you would see a vein deposit here (indicating), and down here you would see a stream flowing. If you were to look at it from an airplane you would see the top of the mountain at a point here and here (indicating), and you would see a stream flowing. [246]

Now, to form a placer deposit, the first thing that must exist, after you have the mineral source, would be erosion for hundreds of thousands of years that this mountain is gradually eroding away. As that is eroded away, you find that the mountain top will be lower. The gold in the quartz will be released. This comes through frost action, through chemical action, organic acids, and so forth. You will find, then, that the particles will tend to work their way down the hill and, as they work their way down the hill, gold is released, further released. You will find eventually these particles will arrive down at the bottom of the

(Testimony of Earl H. Beistline.)

valley, where they will come under the influence of a stream flowing.

Now here you have one type of a deposit. That is known as a residual placer deposit. This type of deposit usually isn't a rich deposit because you have not had good concentration to this point. However, as soon as the material gets down into the valley form, a lot of this country rock, which is clay, is washed away, leaving only the particles of gold and the more resistant rock, such as quartz, boulders, granite boulders, and so forth, that would be here (indicating).

Then you would have a placer deposit that would be formed in a manner like so (indicating), again, now looking from an airplane, and a creek coming down, here would be your mountain coming into here (indicating), and then you would have your gold, say, in through like this, a matter like so (indicating). [247] We might remark that the present location of the gold may not necessarily have any bearing to the stream. In this particular part of the country, that is, the Fairbanks area, we have had just this happen. In addition, we have had another factor that has come in. After the gold has been put into the valley and gravel worked in with it, we have had the entire deposit covered with an overburden. This overburden is locally called muck, and it is derived from the wind blown, it is brought in by the wind from the deltas of the Alaska Range, and it has a depth of from somewhere from one foot maybe up to two

(Testimony of Earl H. Beistline.)

hundred feet. So now, then, the type of deposit that we mostly have in Fairbanks in placers would look something like this. This would be, now, another view, another elevation.

Q. Would you care to use this?

A. All right. Here on the surface we have our moss and our tundra. Below we have our muck. That muck again has a depth of anywhere from, say, zero feet up to maybe 250 feet. It is all wind blown for the most part, occasionally worked over by water. It contains no gold whatsoever. The only thing of any value found in the muck is remains of the Pleistocene animals, the mastodon, the mammoth, the saber-tooth tiger, and so forth. And then below the muck we have our gold-bearing gravels, and the gold-bearing gravels can vary in depth from zero, maybe, up to 250 feet, depending on where you are. Gold has been concentrated in the gravel. Sometimes it is evenly distributed throughout in [248] a vertical section. More often than not you do not have that type of distribution. You have a very irregular distribution, with quite a bit of the gold being concentrated at bedrock. This, then, would be your bedrock, solid rock (indicating).

The bedrock doesn't turn into solid rock, such as you would have at the top of a table here. Rather, it is decomposed for maybe two or three feet, and as a result, a dredge coming by or a placer operator will dig several feet of bedrock, as well as the upper portions of the gravel.

(Testimony of Earl H. Beistline.)

That, essentially, gives an idea of the type of deposit that we do have here. I might explain once again that when the gold is put down, that is quite irregular. We never know where it is going to be. It can be concentrated here (indicating). It could be spread throughout the gravel. It could be concentrated up and down the stream in pockets, or pot-holes or sections of bedrock that are swept absolutely clean, and other sections where it is quite heavy.

If you care, I can now explain drift mining.

Q. If you please, would you now explain the various methods of placer operations or mining of gold, with emphasis on drift mining generally?

A. If I may put it this way; that you have a number of different types of placer operations. One of the very common types in this area is dredging, and for dredging the overburden is removed by water under pressure. The gravels, which are [249] thawed, have to be thawed, and after they are thawed a dredge comes in to excavate all of the gravel and carry it away. The same thing is done by a small-scale method, quite often known as your mechanical methods, or hydraulic methods, where you use a bulldozer to push the overburden away, to push the gravel into recovery plants which are known as sluice boxes.

Another method now used to a very large extent in the past has been drift mining, and that, of course, is probably the most important part of this discussion now, and drift mining is used to



(Testimony of Earl H. Beistline.)

mine small areas, or areas where it will not pay to remove the overburden and a great depth of gravel. The method used to develop a drift mine will be first to sink a shaft, come to the surface, sink a shaft on down to bedrock. After a shaft has been sunk to bedrock, then drifts are driven. A drift is an underground opening, usually horizontal. Drifts will be driven upstream usually, downstream. It doesn't have to be upstream or downstream. It could be across the stream. And then mining will begin at a point here (indicating).

One of the peculiar characteristics of drift mining is that you will only mine a relatively narrow depth, perhaps six feet. That six feet will be made up, maybe, of four feet of gravel and two feet of bedrock.

The reason for this is that you are taking out the area where the gold has been put down next to bedrock. The gold that is scattered up through the gravel here is never recovered by [250] drift mining for the most part. Now, this again is a vertical section. If you were to look at this same thing from an airplane looking down, you would have your shaft here (indicating), you would go down the shaft a depth anywhere from 25 feet to maybe several hundred feet, and you would drive your drifts out, as indicated here (indicating), and at the end of the drifts you would put in your cross cuts like so (indicating), and then you would start thawing the gravel and hoisting it to the surface out the shaft. That material, then, comes

(Testimony of Earl H. Beistline.)

out of the shaft, and it is washed usually in a sluice box.

Q. Mr. Beistline, if you had been driving down a drift in drift-mining operations and had encountered what you thought was rich pay, what is the probability that you would continue to find the same amount of probable rich pay as you continued the drift?

A. Due to the irregular deposition that takes place in a placer deposit, it wouldn't be indicative one way or another. In other words, you have irregular spots. You may have a good spot here (indicating) and out here none. It could be the other way.

Q. One foot beyond what you mined or sampled or tested in the mine there may be nothing?

Mr. Taylor: Just a moment. Your Honor, I am going to object to the question and ask that it be stricken, as entirely leading and suggestive of the answer. [251]

Mr. Cole: Very well, I will restate the question.

Mr. Taylor: I think since Mr. Beistline is on the stand he is the one that should do the testifying.

The Court: Very well. Sustained. And are you through with the chart? Do you wish to go back on your chair over here, Mr. Beistline?

Mr. Cole: At this time I will move that this be marked for identification and move that it be admitted into evidence.

(Testimony of Earl H. Beistline.)

Mr. Taylor: We object, your Honor, on the grounds that we already have a sketch in evidence here of perhaps a better illustration than Mr. Beistline's.

Clerk of Court: Defendant's Identification C.

(The chart was marked Defendant's Identification C.)

The Court: Very well. Identification C will be received. We are certainly not taking the other exhibit out, Mr. Taylor.

Mr. Taylor: This is an exhibit, your Honor.

The Court: That exhibit is not being removed.

Mr. Taylor: Oh, no, no.

Clerk of Court: This is Exhibit No. 2.

(The chart previously marked Defendant's Identification C was received in evidence and marked Defendant's Exhibit No. 2.)

The Court: Is the other one received?

Clerk of Court: No, it has not, your Honor.

Mr. Cole: I ask that it be marked for identification and [252] move that it be admitted into evidence.

Mr. Taylor: We object, your Honor, as purporting to serve the same purpose. That has already been introduced in evidence. It would only be cumulative and corroborative.

Clerk of Court: Defendant's Identification D.

The Court: D will be received.

Clerk of Court: Exhibit No. 3.

(Testimony of Earl H. Beistline.)

(Chart drawn by witness Beistline, marked Defendant's Identification D, was received in evidence as Defendant's Exhibit No. 3.)

Q. (By Mr. Cole): Mr. Beistline, if while drifting in a placer drift mine, good or so-called good pay had been obtained, is it logical to assume that these same values would continue in the drift if it were extended?

A. No, it would not.

Q. Why?

A. Because of the irregularity of a placer deposit.

Q. Would you amplify that, please? Can you amplify that answer?

A. Yes. By the very nature in which your deposit is put down, there are so many factors that enter into the gold being caught in bedrock. The gold does not come out as a uniform ribbon or a layer in the deposit but rather it depends on the type of bedrock you have, the velocity of the waters, and many [253] other things of that nature. So here you may have a pocket of gold, five feet away you may not, and it could be that way throughout the deposit. There are many spotty deposits known in the Fairbanks area.

Q. Is there any way, Mr. Beistline, to determine or to estimate the gold-bearing content of the particular claim or area of ground for placer operations?

A. Yes, there is, Mr. Cole.



(Testimony of Earl H. Beistline.)

Mr. Taylor: Just a moment. I didn't quite get that question.

The Court: I will have it read.

(Thereupon the reporter read the last question.)

Mr. Cole: And the answer?

(Thereupon the reporter read the last answer.)

Q. (By Mr. Cole): What is that method, Mr. Beistline?

A. That is a method of prospecting known as churn drilling.

Q. And what is churn drilling?

A. Churn drilling consists of taking a sample by making a hole varying in diameter from three inches up to six inches, other extremes also. Material from the hole is brought out, the gold is recovered, the volume of the hole is measured, and from that particular point you can then establish a unit value. Additional holes then are put down throughout the deposit. Each [254] hole is given a unit value; after the hole is drilled it can be combined, and from that combination one can determine if a profit can be made in mining that particular area.

Q. Is there any way to determine the gold-bearing content of a claim without drilling and sampling, as you have outlined?

A. There is no way of determining the gold content in a claim other than by prospect sampling.

(Testimony of Earl H. Beistline.)

Q. Are you acquainted with the manner in which the area surrounding a placer drift mining operation would be sampled? A. Yes, sir.

Q. How many holes would you have to drill in the immediate area of a drift and lying beyond to determine with any degree of accuracy the amount of gold-bearing ore or the gold-bearing content of that gravel?

A. The number of holes would be determined by the general characteristics of the deposit. You will find that in prospecting a creek you may need as many as 200 holes. The holes can be spaced at fairly large intervals. In other cases you will find that holes will be spaced at very small intervals.

Q. I call your attention to Plaintiffs' Exhibit V. Will you please observe it, and you may step down from the witness stand.

Can you interpret it, and is it legible to you?

A. Yes, sir. This is evidently the shaft (indicating) in which mining was started and by the legend the drifts came [255] down here and turned and followed to a point there (indicating).

Q. Now, if there had been a drift that extended along the line which my finger has indicated and a face opened in this area of approximately 60 feet wide by 30 by 6, how many drill holes would it be necessary to drill, in order to determine the areas surrounding this drift which could be mined, would it be necessary to drill to accurately sample the ground?

A. If I might just explain for a minute the

(Testimony of Earl H. Beistline.)

theory behind sampling, I think perhaps it will help to answer your question.

Q. You may.

A. We can give two extremes of the sampling procedure. The very best sample is the entire deposit. We know that is not practical, because after we have that sample we have no deposit and can't mine.

On the other hand, the very poorest sample that we can get will be the smallest portion that we could take from a deposit.

The practical method would be to take a number of samples that would give us a good, representative value for the deposit.

Now, on a large creek that, say, is five or six miles long and perhaps seven or nine feet wide, you would arrange a prospecting program that would allow samples to be taken maybe every thousand feet in a line across the pay streak, that is, across the valley, every thousand feet, you will drill a line of holes. The spacing of the holes across the valley in the line could probably be 150 to 200 feet apart. By the time you finish the [256] entire creek you would have two, three or four hundred holes.

In other cases where you know that you have a spotty deposit, instead of having your lines a thousand feet apart, you would have your lines 500 feet, 200 feet, maybe a hundred feet apart, and you would have the spacing between the holes, instead of being two hundred feet, maybe 100 feet,

(Testimony of Earl H. Beistline.)

maybe 50 feet, maybe 25 feet. You would have to design your prospecting program to the creek you have. It is true we are trying to find out information but there is a balance, the egg and the chicken, along the way.

So to block out ground in this particular case, it would seem to me that you would have to have at least a face here plus several drill lines covering the entire extent that you want, and I would say there that you would probably want close spacing of maybe 25 feet across the pay streak.

Does that answer your question?

Q. That is fine. Thank you, Mr. Beistline. That is all.      A. It is a little difficult to——

Q. Now, is it possible to estimate the pay of that area without taking those samples as you have indicated, with any degree of accuracy?

A. It would be impossible to get the amount of pay without taking samples.

#### Cross Examination

Q. (By Mr. Taylor): Now, Mr. Beistline, just hold your position there a [257] moment.

A. Yes, sir.

Q. Now, Mr. Beistline, you have qualified yourself as an expert in placer mining. First I will ask you: I suppose you have talked this matter over with Mr. Cole, have you?

A. Yes, up to a certain point, Mr. Taylor.

Q. Are you connected now with any mining operations in the Fourth Division——



(Testimony of Earl H. Beistline.)

A. Yes, sir, I am.

Q. —and that is the McClaren River?

A. No, I am not connected with McClaren River, as such.

Q. That has gone defunct, has it not?

A. No, sir, the company is operating now, I understand, carrying on a mining program, mining, drilling, and also driving drifts.

Q. You are not connected with it any more?

A. Other than being a minor stockholder.

Q. What compensation are you receiving for testifying in this case, Mr. Beistline?

A. None, sir.

Q. No compensation?           A. No, sir.

Q. Were you subpoenaed to come here?

A. No, sir. [258]

Q. You just out of the goodness of your heart came in and testified?

A. I was asked to come in as an expert witness.

Q. Isn't it a fact in some creeks, Mr. Beistline, you will find the gold for eight or ten or twelve claims, maybe over a distance of several miles it will be pretty evenly distributed, especially where the creek bottom is fairly narrow?

A. You have that possibility, yes, sir.

Q. Have you ever been on the Gold King Placer Mine over near Grub Stake?

A. No, sir. I have spent a year in that area, on Caribou Creek, and I don't recall the name of the claims.

Q. Just, for instance, assuming that across here

(Testimony of Earl H. Beistline.)

(indicating) and across here (indicating) there is a line of drill holes, some of them 25 feet apart and across this way a line of holes 50 or 100 feet apart, and that in this area here those drill holes showed \$2.18 on bedrock and the next one would show \$3.14 and vary along those lines over a considerable distance there, and that valuation was based upon \$20.67 per ounce, would you state whether or not that would be good drift?

Mr. Cole: I object to that question, your Honor, on the ground that it is stating hypothetical facts, none of which are in the record.

The Court: Sustained.

Mr. Taylor: That is a hypothetical question, your Honor. [259] I think I can——

The Court: There is nothing in the evidence, however, to bear it out.

Q. (By Mr. Taylor): Well, now, say for instance, Mr. Beistline, this is in evidence, Mr. Beistline, say that this drift was run in here (indicating), this shaft is here, they made a turn here (indicating), this is an abandoned drift, and this is an abandoned drift, they came down here and then they went over here and then they came back and up here (indicating) and came on over. When they got approximately to there (indicating) that they ran into some high dirt, that is, the pans showed there from fifty cents to \$1.50 a pan, taken from a height of six feet and scraped off of the frozen muck or frozen muck and gravel down to bedrock, and it averaged from fifty to \$1.50 a pan, and by

(Testimony of Earl H. Beistline.)

reason of that showing they then drifted 30 feet along the pay streak or what we call the rich zone and 30 feet the other way, and that intense panning the full face of there showed the same values and that the points were put in as they excavated and took out that gold-carrying strata six feet high, 12 feet deep and 62 feet long, and then after that was removed the values showed even better when they were driving the points in for the next thaw, would you say that would be a minable drift proposition?

A. Before answering that question, may I——

Q. Just answer yes or no. [260]

Mr. Cole: If you can't answer the question, just say so.

Q. (By Mr. Taylor): Now, another thing, we have a hoist here (indicating), a steam hoist, and we had a shaft, and we also have rails and mine cars down to the place.

A. I have one question that, I would very much like to answer but one thing bothers me.

The Court: Are you able to answer the question?

The Witness: If the units are cleared up for me; in other words, the units that have been given here to me are a dollar and a half, or some such figure as that. Now, is that a dollar and a half per cubic yard?

The Court: He wants to know the quantity.

Mr. Taylor: No, that is fifty cents to a dollar and a half per pan, which would be equivalent, 50 cents a pan, to about \$3.50 per yard or \$3.50 per cubic foot or \$94.50 per cubic yard.

(Testimony of Earl H. Beistline.)

A. Using your figures of \$3.50 a cubic yard—a foot.

Q. (By Mr. Taylor): Cubic foot. You are taking out six foot high.

The Court: Mr. Taylor, I think it would simplify matters if you would stay with the testimony instead of going into cubic yards or cubic feet, I think it was per shovel or per pan.

Mr. Taylor: Yes, but, your Honor, we reduced that down to seven pans to a cubic foot.

The Court: You have done that, I believe. I haven't checked [261] that. There is nothing in the evidence about that.

Mr. Taylor: Mr. Kupoff testified to that, your Honor, that it was fifty cents to a dollar and fifty cents a shovelful or pan.

The Court: That is right.

Mr. Taylor: Yes, per pan.

Mr. Cole: Your Honor, I will agree that the witness said there were 27 pans or shovelfuls per square foot and performed some——

Mr. Taylor: No, not square foot, your Honor, because that would be cubic foot, and not 27—7 shovelfuls per cubic foot.

The Court: Very well.

A. You still are not dealing in the units that quite often would be used to evaluate placer deposits. In other words, when we evaluate a placer deposit we use two common methods. We use a value based on cents per square foot, which is a common method used when drift mining was done.



(Testimony of Earl H. Beistline.)

At the present time, now, at the present time most of the large companies would use the unit cents per cubic yard. It is a much easier figure, and you have a certain quantity, you have so many cents per cubic yard.

Now, cents per square foot, that figure is useless unless you have the depth. If you put in, say, that you have a vertical height of six feet and if that represents one square foot of area and if that runs, say, fifty cents, then we can convert to cents per cubic yard. In other words, it would be 27 [262] cubic feet per cubic yard, divided by six, which would be a little more than four, four and a half times fifty cents would give you \$2.25.

Q. (By Mr. Taylor): Per what?

A. Per cubic yard.

Q. No, you are wrong, because we are taking it on the cubic measurement as the sample is taken from six feet up and it is scraped off all the way down, so that there would be, you might say, a cross sampling of that, so then you pan it, and that would run fifty to a dollar and a half for every pan. Of course, they could go down to bedrock and just one pan from there they have \$3.50 a pan.

Mr. Cole: There is no such evidence as that in the record.

Mr. Taylor: It is in the old record.

Mr. Cole: I wasn't aware that we were using the old record.

The Witness: I will answer your question very

(Testimony of Earl H. Beistline.)

specifically if you will convert your figure to dollars per yard, which I think you did.

Q. (By Mr. Taylor): \$94.50 per yard, what would that——

A. If that ground ran \$94.50 per yard, the area represented by that sample would be very minable.

Q. Yes, sir, and if the entire frontage of that 60 feet there after the 12 foot was taken out and it even showed better values than that as they went into the pay streak but didn't [263] get across the pay streak and at where the frozen ground is still up here where they haven't opened up the face and the values were holding up the same up at each end as they were in the center——

Mr. Cole: I object to that question. It contains many matters which aren't in evidence.

Mr. Taylor: Mr. Kupoff testified to that and Mr. Zukoev also.

The Court: He may answer and the jury is cautioned to recall the evidence.

A. To evaluate a block of ground, the samples that you have here would be given a certain distance of influence and it could come out like so (indicating); how far you would go in either direction is usually dependent on additional prospecting that would be done out on either extreme, and what we can say is that the ground had the samples, had the values to indicate that that area that actually they came from could be minable.

Q. (By Mr. Taylor): What?

(Testimony of Earl H. Beistline.)

A. Probably under the figures that you gave of some \$94 a cubic yard.

Q. Now, Mr. Beistline, I call your attention to Plaintiffs' Exhibit W. Is that a fair representation of underground workings of a mine?

Mr. Cole: I object to that question, your Honor. It doesn't [264] make any difference. How does this witness know it is a fair representation of an underground mine?

Mr. Taylor: He described underground mining. I am asking him for the purpose of the jury if that is a good representation of underground mining.

The Court: I will permit him to answer, if he can.

A. Yes, that shows to me what is taking place. You have the surface of the ground shown here. You have a vertical shaft, the opening driven this way, a parallel opening down this way and then the face.

Q. (By Mr. Taylor): Your track and mine cars and all; is that right?      A. Yes, sir.

The Court: Mr. Taylor, may the witness come back to the chair?

Mr. Taylor: Yes. Pardon me, your Honor.

(Thereupon the witness resumed the witness chair.)

Q. (By Mr. Taylor): Now, Mr. Beistline, I hand you——

Mr. Cole: I am going to object to any further conversation with regard to this because this piece

(Testimony of Earl H. Beistline.)

of paper has been offered in evidence many, many times and has been excluded from evidence.

The Court: It is true, it is not in evidence. I don't know whether counsel can get it into evidence through this witness or not, but I will let him put his question. [265]

Q. (By Mr. Taylor): Mr. Beistline, I have here Plaintiffs' Identification No. 19, and I can explain some of the matters here. The dark dots are drill holes.

Mr. Cole: Your Honor, I hate to continually object, but I think——

The Court: I didn't know what counsel was going to ask the witness.

Mr. Cole: He knows better than that.

Mr. Taylor: You don't.

Mr. Cole: Well, if you don't, it is about time you learn.

Mr. Taylor: The old miner back there.

The Court: Of course, the identification is not in evidence. I thought maybe you were trying to lay the foundation by this witness to get it into evidence. There would be no other object in questioning him.

Mr. Taylor: That is right, your Honor. He is an expert on this. I was just going to ask him a question, showing him the drill holes and just wanted to know if it would be possible to get some idea from those drill holes, if we had the result of them, as to whether it would be a test.

The Court: I will not permit that question.

Mr. Taylor: That is all. [266]



(Testimony of Earl H. Beistline.)

Redirect Examination

Q. (By Mr. Cole): Mr. Beistline, when you say the area around there would be minable, it is pretty much a guess whether they would be able to make any profit mining the area or how much it would be?

Mr. Taylor: Just a moment. Your Honor, we object to the leading question and the conclusion of the attorney. He should know better than do that.

The Court: I am going to sustain it as leading.

Q. (By Mr. Cole): Would it be possible to determine, Mr. Beistline, without knowing the expenses which were being incurred by the operation to determine whether the area would be profitably minable?

A. You would have to know the expenses to calculate the amount of profit. That very definitely is true in any operation, you have income and expense. The difference between the two would be the profit. The income is determined by sampling the deposit to determine the amount of money. The expense quite often can be calculated in detail, taking the wages of the men concerned, the expense of mining, purchase of equipment, and so forth.

Q. Is it possible to determine, without samples being taken of the surrounding area, how much of the area would be profitably minable? [267]

A. Without samples, no. The samples will give you one phase of the little formula, income.

Q. What was the average cost of moving a cubic yard of gravel in a mine such as that in 1940?

(Testimony of Earl H. Beistline.)

Mr. Taylor: Just a moment, Your Honor, I don't think that the witness was—that a proper foundation has been laid for such evidence as that.

The Court: Yes.

Mr. Taylor: I think that counsel is going into something that was touched upon in direct examination.

Mr. Cole: May I make a statement? Mr. Taylor asked whether it would be minable, and profitably minable, and that is the reason I am trying to reopen the door for that question.

The Court: There is some point in that, but I think you asked in 1940.

Q. (By Mr. Cole): In 1942, how much was the estimated cost of moving a cubic yard of gravel in a placer drift mine such as outlined on the exhibits which you have been shown?

Mr. Taylor: Just a moment. I don't think he has taken all the facts into consideration, the wages, the cost of boarding the men, and so forth.

The Court: The witness may answer if he is capable or able.

A. Mr. Cole, I can give you some minimum and maximum costs [268] for drift mining that are published in Field's Handbook, Mining Engineers' Handbook.

Q. (By Mr. Cole): Please do.

A. Drift mining on Fairbanks Creek in this area had a minimum cost of about \$2.44 per cubic yard, a maximum cost of around \$7.85, and the average for 17 claims was \$5.40 per cubic yard.

(Testimony of Earl H. Beistline.)

That was published in Peele's, the Engineers' Mining Handbook, and I am quite sure of my figures, but I am not sure of the date.

Mr. Cole: That is all, thank you.

### Recross Examination

Q. (By Mr. Taylor): So, then, Mr. Beistline, for gravel that had \$94.50 worth of gold, that would be a very profitable operation, would it not?

A. By the figures that I have given, I would assume yes.

Q. Let's go back to 1942, when the miners were paid 95 cents an hour, they reported for \$1.50 a day, wouldn't that make the cost of removing each yard of gravel considerably less than that?

A. No, sir. I believe the figures were probably a little earlier than 1942.

Q. So it would be about the same then?

A. Or, in fact, I think it would go the other way. I think costs have increased, wages have increased and so forth, even [269] back.

Q. Since then? A. Yes.

Q. If the wages went from 72 to 95 cents an hour they would still make a very good profit on \$94 a yard dirt, would they not?

A. \$94 a yard dirt is very fine dirt, if you can find it.

Mr. Taylor: That is all.

### Redirect Examination

Q. (By Mr. Cole): Mr. Beistline, have you ever

(Testimony of Earl H. Beistline.)

found any, that you know of in appreciable quantities, \$95 a yard dirt in the Fairbanks area?

A. I am not aware of such at the present time.

Mr. Cole: That is all.

(Witness excused.)

Mr. Cole: Now perhaps we could take the recess.

The Court: Is that satisfactory?

Mr. Taylor: That is satisfactory.

The Court: Members of the jury, please heed the admonition I have previously given to you, and we will recess for ten minutes.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

(The jury was excluded from the courtroom.)

The Court: Are the parties ready to proceed?

Mr. Cole: The defendant is ready, your Honor.

Mr. Taylor: The plaintiff is ready, your Honor.

The Court: Very well. The jury will be kept out for a few minutes. At this time I will consider more fully Mr. Cole's offer in connection with reading of a portion of the testimony of the former trial. What do you have in mind, Mr. Cole?

Mr. Cole: I wish to commence reading, your Honor, at the bottom of page 53 of the official transcript beginning with the question, "They were still working. Now, going back a ways, Mr. Kupoff, when you were working, driving that drift, did you take out any gravel?" and he states that he had taken out gravel and they had left it, they never



washed any, and most of it was still out there, and then again on page 56, at the bottom, the witness was asked whether they cleaned up the dump and he doesn't know whether anyone washed it up, and the same testimony appears on page 58 and page 59.

The Court: For what purpose are you offering it?

Mr. Cole: I am offering this testimony in evidence for the purpose of establishing a connection between a dump which is on the property at this time——

Mr. Taylor: We object to that, your Honor.

Mr. Cole: ——and the dump which—to show that the dump which [271] is now on the property is the same dump which the plaintiffs left, and by their own testimony establish a rational connection as a foundation for further testimony.

Mr. Taylor: If the Court please, Mr. Kupoff said he didn't recognize that dump at all when he was given a defendant's identification the other day. I don't think that there was enough information brought out from Mr. Kupoff to say whether his testimony was in relation to this dump, a small dump which appeared in this picture. I don't see where there is any relation to it, your Honor. He didn't say that was the dump that they left out there.

The Court: Perhaps my ruling is erroneous, but I understand the defendant is attempting to offer a portion of the testimony of the witness in the former trial for substantive evidence in the defendant's case, and I will reject and deny the offer.

Are we ready for the jury now?

Mr. Taylor: The plaintiffs are ready, your Honor.

Mr. Cole: The defendant would like a ten-minute recess, your Honor. I would like to have permission to submit authorities to the Court on that proposition, because I have authorities for it.

The Court: If you can submit them right now, I will consider them.

Mr. Cole: I would like a ten-minute recess, your Honor.

The Court: The trouble is after a ten-minute recess, then [272] after you submit them, I will want to look at them.

Mr. Cole: May I have just a moment?

I think for the record at this time I had better state quite clearly my position.

The Court: Very well.

Mr. Cole: It hasn't been done before.

It is the defendant's contention that the admissions exception to the hearsay rule permits the introduction of any statements which are relevant to the issue to be introduced, and that since these statements may be introduced through the testimony of any person who heard them, such as any person who was in the courtroom and heard the statements being made, therefore these same statements may be introduced in evidence through the introduction of the official transcript, which in theory of the law is much more reliable than the testimony of any witness who heard the statements being made.

That is the position of the defendant.

At this time I don't have case citations, but at this time I again request permission to introduce into the record portions of the testimony of Mr. Kupoff in the prior action through the admission of the official transcript in the prior case.

The Court: Perhaps it is a matter that I should be well versed in, but it is a matter of first impression to me and counsel having no authorities, I will deny the offer, and shall we have the jury brought in? [273]

Mr. Taylor: If the Court please, I was just going to state, if this comes up again, the Federal Rules of Civil Procedure provide that a deposition taken in a previous case can only be used if the witness is out of the jurisdiction of the Court.

The Court: This isn't a deposition.

Mr. Taylor: The evidence used in a former trial. I looked it up after the Court ruled in regard to my motion to allow the reading of the testimony of Joseph Ullmer in the previous trial, and I found out the Court was right in its ruling. I don't think it would be proper to allow him to just pick and choose a few lines here and there.

The Court: The jury may be brought back.

(Thereupon the jury was brought into the courtroom and resumed their places in the jury box.)

Mr. Cole: I call Douglas Colp.

**DOUGLAS COLP**

a witness called on behalf of the defendant, after being duly sworn, testified as follows:

**Direct Examination**

Mr. Cole: Your Honor, may I recall Mr. Kupoff for cross examination under the Federal Rules of Civil Procedure.

Mr. Taylor: We object, your Honor, He has already been cross examined.

The Court: He may be called. [274]

Mr. Taylor: He can make him his own witness.

The Court: The objection is overruled. You may step down, then. Counsel has changed his plan. You will please wait, Mr. Colp.

(Witness temporarily excused.)

**NICK KUPOFF**

one of the plaintiffs, having been previously sworn, was called on behalf of the defendant, and testified as follows:

**Direct Examination**

Q. (By Mr. Cole): Mr. Kupoff, on or about the 28th day of December, 1948, in this courtroom, in the trial of the action entitled Nick Kupoff, James Zukoev, Mike Kitoff, Nick Kabak, a partnership, doing business under the firm name and style of North Star Mining Company versus Vuka Radovich Stepovich, did you not testify in response to the following question, as follows:

“Q. They were still working. Now, going back a ways, Mr. Kupoff, when you were working, driving that drift, did you take out any gravel?”



(Testimony of Nick Kupoff.)

And did you not answer: "Yes, we have."

A. I don't remember what I answered ten years ago.

Q. And to the question: "And what did you do with that?" did you not reply, "Well, we left it out there. We washed some and left a big pile out there. Never had a chance to clean anything." [275]

Mr. Taylor: Just a moment, your Honor. I think that I am going to object to the question, upon the ground that there is no stating as to what the subject matter is that he is talking about. I think he should go back further and take more of the record so that the jury and the witness will know what the subject matter of the conversation was.

The Court: Of course, if the witness doesn't know what the question is, he may say so.

You may proceed.

Q. (By Mr. Cole): Did you not give that answer?

A. Well, I can't give it to you, because I don't remember. You have got it in the books and I haven't. I don't remember what I say.

Q. And then to the following question did you not give the following answer:

"Q. What did you do with the gravel you took out of the drift?

"A. We pile it there at the head of the boxes."

A. That is the same thing, I don't remember what I answered before.

Q. Did you not give the following answer to the following question:

(Testimony of Nick Kupoff.)

“And then, afterwards, what did you do with that gravel? [276]

“A. It is still out there, as far as I know.”

Did you say that?

A. That could be, but I don't remember what I answered, to tell the truth.

Q. Did you not give the following answer to the following question:

“Q. Did you ever wash it?

“A. We wash some, but most of it is out there”?

A. Well, that is the same thing, I might say that.

Q. Is that true?

A. No, I can't give you the truth on that. I don't remember what I answered ten years ago.

Q. When you left, did you leave a dump out there?

A. Maybe that is out of this book—yes, we left a dump out there.

Q. And did you not give the following answer to the following question:

“Q. Did you and your partners clean up the dump? Did you wash the dump that you had out there?

“A. Well, not after that clean-up.”

Is that right?

A. Well, what dump we had after we closed out, we never touched it.

Q. So as far as you know the dump is still out there?

(Testimony of Nick Kupoff.)

A. Well, it could be. I never been out there since. [277]

Mr. Cole: That is all.

Mr. Taylor: That is all.

The Court: That is all, Mr. Kupoff.

(Witness excused.)

Mr. Cole: I now call Douglas Colp.

### DOUGLAS V. COLP

called as a witness on behalf of the defendant, having previously been sworn, testified as follows:

#### Direct Examination

Q. (By Mr. Cole): What is your name, sir?

A. Douglas V. Colp.

Q. What is your occupation, Mr. Colp?

A. Consulting mining engineer.

Q. How long have you been a consulting engineer?

A. Less than two years.

Q. What formal training have you had as a mining engineer or mining operations?

A. I graduated from the University of Alaska in the spring of 1940 with a degree of Bachelor of Science in Mining Engineering.

Q. What experience have you had in mining operations prior to and subsequent to your graduation from the University of Alaska?

A. I have worked around placer mining and mining in the interior of Alaska since 1936, during my college work and after. [278] During my college work I worked for the American Creek Operating

(Testimony of Douglas Colp.)

Company in the Manley Hot Springs district for three years. I worked for the F. E. Company prior to that, and then I worked in the Caribou country in the Upper Salcha for one year on that dredging, built that dredge at that locality, and then after the war I was up in the Koyukuk, spent one season in the Koyukuk country below Wisman, and then was superintendent for five years for Kobuk Drainage, and I was superintendent for Callahan Zink Lead Company at Livengood for three years, and then I went working for the, became associated with the coal-mining industry at Healy and the Matanuska Valley after my work with the Callahan Zink Lead Company at Livengood. Almost two years ago I became associated with the Philleo Engineering Service here in Fairbanks, after having received my registration number from the Territory of Alaska to practice mining engineering therein.

Q. Have you had any experience with placer mining evaluation?           A. Yes, sir.

Q. What has been that experience?

A. During work in the placer mining field, the first prerequisite is always to know what is in the ground and, consequently, I have worked on drilling rigs, I have panned behind drilling rigs, and have helped evaluate the ground in several localities.

Q. I will hand you Defendant's Exhibit 1, Mr. Colp, and ask you to please observe it. [279]

(Witness perused the exhibit.)

Q. Have you observed it?           A. Yes, sir.

Q. Do you recognize it?           A. Yes, sir.



(Testimony of Douglas Colp.)

Q. Have you had occasion to recently view the premises which are portrayed in this exhibit?

A. Yes, sir.

Q. Would you state the occasion, please?

A. On, I believe it was, October the second, this past October the second, I was asked by the counsel for the defendant in this case to evaluate the dump on what I will call the Stepovich claim on Fish Creek, and on the third of October I visited the claim and began my evaluation of the dump. That is visible in the picture there.

Q. When you first began your evaluation, what did you do, Mr. Colp?

A. To begin a valuation such as this without a drill, the first step is to dig holes at intervals over the pile, and in this particular instance I dug 15 holes. From those 15 holes I took 30 pans of material. I dug these holes approximately one foot deep. I shouldn't say one foot deep. I should say one foot in volume. I took about one cubic foot of material out of the hole. Some of the holes were a foot deep, some of them were more than that. The deepest one was  $2\frac{1}{2}$  feet deep, but from [280] these holes, from each of these holes, I took two pans of material and bailed water out of a shaft that I found near this dump into a barrel and I panned the material, panned out these 30 pans of ground.

The panning, I imagine you are all familiar with, is the process we call the extraction of the gold from the gravel. That is, to put the material into a gold pan, you rotate and oscillate and gyrate this

(Testimony of Douglas Colp.)

pan of material under water. The gold, being approximately nine times heavier than gravel or sand, sinks to the bottom and the sand floats or is worked over the edge of the pan. By a process of eliminating the lighter material and the concentration of the heavier material, it results in the gold being deposited on the bottom of the pan, with all the material, waste material, off, and these particles of gold were placed in vials.

In most cases I put four pans in one vial. In one case I put eight and in another case I put six, and I noted on the vial approximately how much each pan contained. I estimated that and upon completion of the sampling I brought the samples into a milligram balance scales and weighed the samples and so noted the actual weight of the sample on the vials.

Q. Mr. Colp, from your experience as a mining engineer and in connection with your appointment in evaluation of placer mining have you done much panning?      A. Oh, yes, sir. [281]

Q. Do you have any idea how many pans of gravel that you have panned?

A. That is a rough question. Thousands. I don't know.

Clerk of Court: Defendant's Identification E.

(Picture of purported dump at Fish Creek was marked Defendant's Identification E.)

Q. (By Mr. Cope): Mr. Colp, I hand you Defendant's Identification E and ask you to please observe it.      A. Yes.

(Testimony of Douglas Colp.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it? A. Yes, sir.

Q. What is it?

A. This is the same dump as shown in the other photograph. One——

Q. Let me ask you a question, or perhaps you had better continue.

A. These are two views of the same dump. One view is taken from the top of the intake flume looking in a northerly direction, showing the top of the dump, and it also shows the position of five different excavations I made for sampling purposes.

This other picture is a side view of the dump and it shows [282] six holes that were made for sampling purposes.

Q. Do those photographs truly and accurately portray the scene? A. Yes, sir.

Mr. Cole: The defendant moves admission into evidence of Defendant's Identification E.

Mr. Taylor: To which the plaintiffs object, your Honor, on the ground that a proper foundation has not been laid.

The Court: It will be received.

Clerk of Court: Defendant's Exhibit No. 4.

(Picture purported to be two views of dump at Fish Creek, previously marked Defendant's Identification E, received in evidence and marked Defendant's Exhibit No. 4.)

Mr. Taylor: I would also like to make a motion, your Honor, that it be—object to it upon——

Mr. Cole: It has been received.

(Testimony of Douglas Colp.)

Mr. Taylor: Just a moment, Mr. Cole, please. I am making a motion to the Court.

Mr. Cole: It has been received into evidence, Mr. Taylor.

Mr. Taylor: I am asking that it be excluded upon the grounds that it is incompetent, irrelevant and immaterial to prove any of the issues now before the Court, as there is no evidence to show where that dump is, where the rock or whatever it is there came from and it looks like snow to me, and whether it has ever been mined by the defendant. There is absolutely no showing, your [283] Honor, that would allow it in. It would be highly prejudicial.

The Court: The objection is overruled.

Clerk of Court: Defendant's Identification F, G, H, I, J and K, being six bottles.

(The six vials produced by the witness Colp were marked Defendant's Identifications F, G, H, I, J, and K, respectively.)

Q. (By Mr. Cole): Mr. Colp, I hand you Defendant's Identification F and ask you to observe it, please.

(The witness perused the exhibit.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it? A. Yes, sir.

Q. What is it?

A. It is a vial containing 52 milligrams of gold panned from four pans on October—that I panned from four pans of dirt on October 3rd.

Q. Where did those pans of dirt come from?



(Testimony of Douglas Colp.)

A. They came from the dump as shown in the exhibit that I just looked at.

Q. Can you state where or from what part of that dump those pans were taken?

A. This was taken from the top of the dump, near the top of the dump. [284]

Q. I hand you Defendant's Identification G and ask you if you can identify it.

A. Yes, sir.

Q. What is it?

A. That is a vial also containing gold. This amount of gold represents 39 milligrams and it is taken from near the top, probably a little bit further from the top of the dump.

Q. The same dump to which you have made reference?

A. That is right.

Q. I hand you Defendant's Identification H and ask you if you can identify it after observing it.

(Witness scrutinized the proposed exhibit.)

Q. Have you observed it?

A. Yes, sir.

Q. What is it?

A. It is another vial. This contains 51 milligrams of gold from the same dump and it represents four pans of material.

Q. Which you took from the dump?

A. Which I took from the dump.

Q. I hand you Defendant's Identification I and ask you to observe it, please.

(Witness examined vial.)

Q. Have you observed it?

A. Yes, sir.

Q. Do you know what it is? [285]

A. Yes, sir. It is another vial which represents

(Testimony of Douglas Colp.)

four pans of material. Actual weight is 19 milligrams, and it is taken taken from below the half way mark from the surface of the same dump.

Q. I hand you Defendant's Identification J and ask you to observe it, please.

(Witness examined vial.)

Q. Have you observed it? A. Yes, sir.

Q. Can you identify it?

A. Yes, sir, it is the result of eight pans of material taken around the perimeter of the dump. Its actual weight is 20 milligrams.

Q. I hand you Defendant's Identification K and ask you to observe it.

(Witness examined vial.)

Q. Do you know what it is?

A. Yes, sir. It is another sample representing six pans of material from this dump. Its actual weight is 42 milligrams and it is taken from approximately half way down the pile.

Mr. Cole: At this time the defendant moves for admission into evidence of Plaintiffs' Identifications F through K.

Mr. Taylor: To which we are going to object, Your Honor, upon the grounds there is no showing that these proposed samples were properly taken, whether the dump came from the mine [286] operated by the plaintiffs, whether the gravel and muck in which the gold was carried was in its natural state, how long the dump had been there, and we think the introduction of these vials, Your Honor,

(Testimony of Douglas Colp.)

would be highly prejudicial under those circumstances; that there is no showing as to where these came from and, if the Court please, I would surely like to argue this point.

The Court: Well, I don't know how important it is, but I notice that you didn't object to the testimony of the witness all the way through, but when it came to offering the Identifications you objected to the offer for the first time.

Mr. Taylor: I certainly did, Your Honor.

The Court: But there was no objection to the testimony of the witness. I will reserve the ruling.

Mr. Taylor: I thought he would connect it up, but he has not, so I have to object, Your Honor. He hasn't shown it came from the mine of the plaintiffs.

The Court: I am going to reserve ruling until I excuse the jury for the four o'clock recess.

Q. (By Mr. Cole): Mr. Colp, after you took all these samples, did you weigh them?

A. Yes, I did.

Q. And how much did the total weight come to?

A. The total weight came to 223 milligrams, or explaining that a little bit further—— [287]

Mr. Taylor: Just a moment. No explanation has been called for.

The Court: The total weight was 223 milligrams?

The Witness: That is right, sir.

Q. (By Mr. Cole): How much is the value of a milligram of gold?

(Testimony of Douglas Colp.)

A. There are, for estimating purposes——

Mr. Taylor: Just a moment. I am going to object. I don't believe that this gentleman is qualified as to the valuation of gold.

The Court: Objection overruled. He may answer.

A. (Continuing) A milligram, for estimating purposes, there are ten milligrams for every cent. In other words, there are 10 milligrams per cent. In other words, this 223 milligrams represents 223 cents, and that is based on the fact that gold is priced at \$35 an ounce if it is 1,000 fine. Gold is not usually 1,000 fine. It is usually a proportion of that, and in this locality it is around 880, 890 fine. So 890 fine would represent 80/100's of 35, which is around \$31 an ounce, and there are 31,000 milligrams, roughly, 31,000 milligrams of gold in each ounce. So consequently, breaking that down to cents, there are 10 milligrams for each penny. So we use that for estimating purposes. We use that milligram because it comes out conservatively to the one zero figure. Any time you just divide your milligrams by ten and then you have got your cents. It is a handy conversion [288] to make.

Q. Did you figure the value of each pan?

A. Yes, sir.

Q. What was the result?

A. The average value of each pan was around seven-tenths of a cent. The thirty pans of material that I took, divided into the 223 milligrams, is just a little bit more than seven-tenths of a penny per pan.



(Testimony of Douglas Colp.)

Q. Did you calculate the value? Let me ask you this question: did the samples you took represent an adequate sample of that pile—— A. Yes.

Q. ——for accepted mining sampling techniques?

A. It is my opinion that the sampling was sufficient. I sampled it in two different ways. I sampled the value of the pile itself, representing the whole pile. Then I evaluated the value of the material of the upper half of the pile and I got a separate amount per cubic yard of the material on the upper part of the pile.

Q. From all your samples, what did you calculate the value per cubic yard to be of that pile?

A. The value of a cubic yard of the whole pile is \$1.30 a cubic yard. The value of the upper half of the pile is \$1.80 per cubic yard.

Q. Did you calculate the total number of yards in the pile? [289] A. I did.

Q. What did you calculate it to be?

A. I calculated that to be 424 cubic yards.

Q. Did you figure the total value of gold in the pile or dump?

A. Yes. I don't recall the right figure. It is around, multiplying 424 cubic yards by \$1.30 for your total average value of the whole pile you get something like \$550. Multiplying that 424 cubic yards by the maximum value of the pile, which is \$1.80, you get around \$760, I believe, would be a close top maximum value of the pile.

Q. Total value of gold in the pile?

A. Total value of gold in the pile.

(Testimony of Douglas Colp.)

Mr. Cole: That is all.

Mr. Taylor: May we have the customary recess, Your Honor?

The Court: Would you like to have the recess before cross-examination?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court has reconvened.

Mr. Taylor: We will stipulate the jurors are all present, Your Honor. [290]

The Court: Very well, you may proceed.

### Cross Examination

Q. (By Mr. Taylor): Mr. Colp, who are you employed by at the present time?

A. I am working as a consultant, sir.

Q. On your own, as your own business?

A. That is right, in association with the Philleo Engineering Service. They are mainly an architectural firm, and I am the mining engineer with the firm.

Q. Now, who went with you to Fish Creek when you, as you claim, went down there on the third day of October of this year?

A. That is right, sir.

Q. Who went with you?

A. Nobody went with me on the third. Mr. Wil-

(Testimony of Douglas Colp.)

William McMartin went with me as an assistant when I measured the size of the dump.

Q. Are you sure you got the right dump?

A. I am satisfied that I did, sir, yes.

Q. You might have been over on the F. E. dredge tailings?

A. No, sir. I had one of the force, the thaw superintendent for the F. E. Company, Mr. Carl Oakland, at Fairbanks Creek, who had been there for years and years point the dump out to me, and he said that it was the only one with the gin pole on the right limit and when I got there I could be assured that that was it.

Q. Didn't you see two other dumps, two other gin poles, further to the south? [291]

A. No, sir. I saw other dumps, but I did not see other gin poles.

Q. Is that the first time you had ever been to that particular place?

A. The first time I have been to that particular piece of ground. I have been on Fish Creek and Fairbanks Creek before.

Q. Now, your method, you say, of sampling, who were you employed by to go out there and do that sampling?

A. I was employed by the defendant in this case.

Q. And what compensation are you receiving, Mr. Colp?

A. My consulting fees.

Q. What are they?

A. Do I have to state that, sir?

(Testimony of Douglas Colp.)

Q. Yes, sir, you do.

A. Eight dollars an hour.

Q. And are you getting eight dollars an hour for testifying here?

A. I don't get eight dollars an hour. I charge my client eight dollars an hour for the time that I spent on this.

Q. It would be kind of profitable if we slowed up this trial, wouldn't it? A. What is that?

Q. It would be kind of profitable for you if we slowed up the trial, is that right?

A. I am here as I am directed. [292]

Q. Now, did that dump look like it had been put there recently or sometime before?

A. It is not a new dump, sir.

Q. And when you went to test that dump, you say you went in some places two feet?

A. I went in various depths, because I wanted to find out if there was any change in the quantity of gold between the surface and down deeper, and that is the reason for the various depths. I didn't want to scoop up the surface where there might be an enrichment, there might not be a representative sample. Therefore, I went down in depth where the weather, the snow and rain and the effect of freezing and thawing would not affect the concentration of the gold.

Q. Did you go down into the drift while you were there? A. I did not.

Q. Could you get down into the drift?

A. No, sir.



(Testimony of Douglas Colp.)

Q. Why?

A. The shaft was full of water within six feet of the surface.

Q. Then, you don't know how long that dump had been there, Mr. Colp?

A. No, not definitely, no. Willows are growing on it to such an extent that it could be several years old.

Q. And that could have been put there, that gravel or dirt [293] or whatever it was, could have been put there to have you test it; is that right?

A. No, sir.

Q. What?

A. I don't see how you can figure that, sir.

Q. Now, isn't it a fact that that dump or—what did it consist of?

A. Mainly schist, bedrock, schist formation typical of this whole area, Birch Creek schist, some gravel and schist and sediment.

Q. Wasn't most of that dump on the top schist?

A. Pardon?

Q. Wasn't most of that dump on the top schist?

A. It was a schist formation, yes.

Q. And how much of it was gravel?

A. It was gravel which was composed of schist and quartz and the black sands were of hematite and zirconium and the regular bedrock mines.

Mr. Cole: Have you finished your answer?

The Witness: Yes. The dump is representative of any typical bedrock sample that you would get.

Q. (By Mr. Taylor): Just a moment, now. Have

(Testimony of Douglas Colp.)

you seen the bedrock on the Eastern Star Claim? Have you ever been down to take a look at the bedrock? [294]

A. I haven't been down there, no.

Q. Isn't it a fact that if that dump had been there for a number of years that there would be a considerable wearing or weathering of the rock, of the muck and of the gravel, that there would be a movement through it from rains, heavy rains would have the tendency to wash the finer stuff down further into the pile?

A. No, sir, not over your maximum depth of active layer. That is the reason for going down to those various depths. I got as good pans within six inches of the surface as I did two and a half feet down.

Q. Why didn't you go four feet in and see what you would get?

A. I didn't think it was necessary, sir.

Q. Don't you think you should prove here beyond a reasonable doubt that that gold that was in the gravel and the muck and the schist would wash down through that broken mass?

A. Gold in a schist, decomposed schist formation, such we have in most bedrocks, that material is practically impervious to gold and——

Mr. Cole: I am sorry to interrupt. I didn't get that answer. Impervious to what?

The Witness: It is practically impervious to gold being forced into it with ordinary rains and

(Testimony of Douglas Colp.)

weathering conditions. The top three or four inches may dilute itself but——

Mr. Taylor: Just a moment. I think you have lost sight of [295] the question.

Q. (By Mr. Taylor): I am asking you if it is a fact that heavy rains would wash that gold down through this rock and gravel and stuff down to a lower level. Gold is heavier than any of that other stuff, isn't it?      A. That is right.

Q. And if you have water running down through the mass of that pile, it will naturally take that gold down with it, it will dislodge it from what it is hanging on to, won't it?

A. No, sir. It will take it right off of the surface but there is so much fines in that that it fills up the voids between the heavier particles of gravel, and the gold will not penetrate beyond the point, and I was below that point of any dilution, and any concentration.

Q. You say you had a lot of bedrock material and schist in there?      A. Pardon?

Q. You had a lot of schist?      A. Yes.

Q. So that would leave spaces between that schist and the gold would wash down?

A. There is also a lot of gravel and a lot of binding material.

Q. Did you go down and dig in and take any samples inside, [296] not on the ground, but inside of the dump?      A. Inside of the dump?

Q. Yes. Did you shovel right at the surface of the ground and take any samples down there to

(Testimony of Douglas Colp.)

see if any of the gold content of that dump had been washed down onto the ground?

A. Yes, I sampled in the sluice box and around the perimeter and every place where I could——

Q. Wait a minute. Wait a minute.

Mr. Cole: No, let him answer the question.

Mr. Taylor: Well, I will. I won't object if you answer the question, but you are beating around—we might say you are beating around the dump.

Q. (By Mr. Taylor): I asked you if you had dug in at the base of this dump and gone in and taken some samples of the soil upon which this dump rested. A. No, sir.

Q. To ascertain whether or not the gold had percolated down through that soil.

A. No, sir.

Q. Don't you think that would have made a much fairer test, Mr. Colp, if you had done that?

A. No, sir.

Q. Do you give that answer for the purpose of earning your eight dollars an hours? [297]

A. Absolutely not, sir.

Q. You say that was the first time you were ever on the Eastern Star Claim?

A. That is right.

Q. How many dumps such as this have you tested before, Mr. Colp?

A. Oh, I would say in the neighborhood of eight or ten.

Q. And was that in the Fairbanks area?



(Testimony of Douglas Colp.)

A. Not all of them. In the interior of Alaska, yes.

Q. Did you sample any of the other dumps that were on the Eastern Star Claim?

A. No, sir.

Q. This is the one you went down to and somebody told you that it was the dump where there was a gin pole; is that right?

A. That is right.

Q. Were there any buildings there, Mr. Colp?.

A. Any buildings on that?

Q. Yes.           A. Yes, sir.

Q. What kind?

A. There was a boiler house near the shaft that contained a couple of boilers that were used for hoisting the material. There was a tool house next to the boiler house which contained a lot of pipe and drums and odds and ends of mining equipment, and then further to the east of the dump there was a dwelling that was [298] more or less obsolete at this time.

Q. What kind of a building was that?

A. That was a log building, as far as I remember. I just casually walked by it and looked at it.

Q. How big was it?

A. Oh, I don't know. Well, 20 by 30. Twenty by thirty is a rough estimate.

Q. You didn't go in there, though?

A. No. It looked like it was just a one-room building. It had a padlock on the front door.

(Testimony of Douglas Colp.)

Q. How about the back door, was it open?

A. I didn't go to the back door. And the window to the side, that would be the south side, was broken.

Q. Was that the only place you went on the claim, Mr. Cole?      A. Pardon?

Q. Is that the only place you went to on the Eastern Star Claim?

A. Yes, except just in the immediate vicinity of the dump, below the dump.

Q. How did you get down there?

A. Pardon?

Q. How did you get there?

A. I went to the end of the Fairbanks Creek operation, where the thaw pumps are for the Fairbanks Exploration Company, [299] thaw pumps on Fairbanks Creek, and I walked down on the right limit of Fairbanks Creek or Fish Creek and followed the right limit to a cat trail that led me right into the boiler house of this particular property, about a twenty-minute walk from—a fifteen or twenty-minute walk, depending on how much energy you wanted to use, from the end of the——

Q. Was there a road to it?

A. No road as such; however, there was an old cat road and there is a foot bridge across at the foot of the hill, but there had been tractors in there hauling wood to the site, to the shaft.

Q. How was the weather while you were there?

A. Very nice. It had been after a snow. There

(Testimony of Douglas Colp.)

had been about two inches of snow but at the time that I spent there the temperature was in the low forties, I believe.

Q. And how long were you there?

A. Three days.

Q. How long? A. Three days.

Q. And how were the nights? cold?

A. No, I wasn't there at night.

Q. What?

A. I was just there during the day for three days.

Q. And did this muck in the dump in this, was any of it frozen and hung together? [300]

A. Yes, sir. The top three inches were frozen. A few minutes with a pick would break that upper crust and then you can go on down without any obstruction from frost.

Q. You don't know how long that dump has been there, then, Mr. Colp?

A. No, I could guess, but I don't know how long.

Mr. Taylor: I believe that is all.

#### Redirect Examination

Q. (By Mr. Cole): When you were employed, Mr. Colp, was there any statement made to you concerning the results of your findings?

A. My results——

Mr. Taylor: Just a moment. Just moment. I am going to object to the question, Your Honor. It would be self-serving.

The Court: He may answer.

(Testimony of Douglas Colp.)

Q. (By Mr. Cole): The results which were desired?  
A. No, sir.

Mr. Cole: That is all.

(Witness excused.)

Mr. Cole: The defendant calls Ted Mathews.

TED C. MATHEWS

called as a witness on behalf of the defendant, after being duly sworn, testified as follows: [301]

Q. (By Mr. Cole): What is your name, sir?

A. Ted C. Mathews.

Q. What is your occupation, Mr. Mathews?

A. I am a mining engineer.

Q. Where do you live now?

A. 200 Wells Street, in Fairbanks.

Q. How long have you lived in Fairbanks, sir?

A. Since 1936 my home has been here. Part of my time has been spent out on the various mining operations, however.

Q. Are you married?      A. Yes, sir.

Q. Do you have any children?

A. Three boys.

Q. Have you had any formal training in mining and mining engineering?

A. Yes, I graduated from the University of Alaska in 1938 with degrees of Bachelor of Science in Mining Engineering and Bachelor of Mining Engineering.

Mr. Taylor: We will stipulate, Your Honor, that Mr. Mathews is a qualified mining engineer.



(Testimony of Ted C. Mathews.)

Mr. Cole: I would like to show his experience.

The Court: Very well, you may proceed. [302]

Q. (By Mr. Cole): And what practical experience or training in mining and mining operations and placer evaluations have you had since and before graduation?

A. Before graduation I was an engineer for the F. E. Company, and after graduation in 1938 I was Manager of the American Creek Operating Company, a company that operated a small dredging operation at American Creek in the Manley Hot Springs district. That ground we worked out in 1940, and then I became manager of the company called Gold Mines, Limited, who were running an open cut mining operation on the upper end of American Creek, and then several winters have been spent in prospecting for dredging ground in various places in Alaska prior to the war.

Since the war, I have done no active mining; however, I have been a consulting engineering since 1940, when I registered in the Territory and I have carried out from time to time mine evaluation work since we closed down the operating mine at American Creek.

Q. Mr. Mathews, is it possible to estimate the gold-bearing content of an area of placer mining ground without first sampling it?

A. Well, an evaluation requires sampling. There is no other way in which you can know what the value per cubic yard is of placer ground without

(Testimony of Ted C. Mathews.)

first extracting samples, and those samples should be representative of the ground that is being [303] under consideration.

Q. In a placer drift mining operation, what would be the nature and the number of samples which you would have to take of an area before you could give an estimate of its gold-bearing content?

Mr. Taylor: Just a moment, Mr. Mathews. I am going to object to the question as too indefinite and not applicable to any particular type mining and is not applicable to the question now before the Court.

The Court: The objection is overruled. The witness may answer if he understands the question. Do you wish to have it read, Mr. Mathews?

The Witness: Would you please repeat the question?

(Thereupon the reporter read the question.)

A. Well, in any placer deposit, as I stated, you should take a sufficient number of representative samples so that your results would be the same as the total value. Now, there are some variables that enter into the number of samples that you might have to take. One would be the character of the gold, whether it is fine or coarse, and where the gold is coarse there are, you might say, less pieces scattered out through the gravel and you would conceivably have to take more samples and larger ones.

(Testimony of Ted C. Mathews.)

The other thing that would determine probably the spacing of your samples would be the manner in which the ground was going [304] to be worked. If it were a high unit cost, that is, a high cost per yard of extraction and a mining method was being used in which blocks of ground might be eliminated from the total mining, then it would be advantageous to put holes on very close spacing. By that I would say probably fifty foot centers or maybe probably 25-foot centers. If the valuation was being made for a dredging operation where the ground has to be stripped and thawed and worked as a continuous block, then the holes need not be put so close together because it would not be possible to eliminate a small portion of the ground. You would have to take it all.

Q. (By Mr. Cole): Is there any way in which, say, from a drift mining operation, it is possible to predict whether the amount of ground which lies ahead of the drift is profitable ground without sampling it?

A. Not definitely, no. I would say the presence of good ground in a drift would be an indication that you might expect more ahead of you, but it would be no valuation such as we would require for financing purposes.

Q. Mining operation?

A. Yes. That doesn't mean that all operations have been carried on in that manner. Many mines have been started and the operators have worked

(Testimony of Ted C. Mathews.)

them without proper sampling and generally they have, as we say in the business, lost their shirt. The company that is most successful in the area in mining has been [305] the United States Smelting Company, and has probably also been the most exact in their prospecting methods.

Q. What results have they found in actual mining as compared with their sampling?

A. I wouldn't be prepared to say what their ratio is.

Q. Mr. Mathews, I hand you Defendant's Exhibit 1 and ask you to observe it, please.

Have you observed it?      A. Yes, sir.

Q. Can you identify it, or do you recognize it?

A. It is a picture of the dump on the Stepovich property.

Q. Have you recently had occasion to go on that ground?

A. Yes. I was engaged by the attorney for the defense, who gave an independent evaluation of the value per cubic yard of the material on the drift dump shown there.

Q. When you were employed, Mr. Mathews, were you told that a prior——

Mr. Taylor: Just a moment. We are going to object to what he was told, Your Honor.

The Court: It looks like the objection is well taken. I don't know what the——

Mr. Cole: It is preliminary, Your Honor.

Mr. Taylor: Still object.



(Testimony of Ted C. Mathews.)

Mr. Cole: It has no hearsay. [306]

The Court: I will risk it. You may proceed.

Q. (By Mr. Cole): Were you told that a previous analysis had been made?

A. Yes, I was told that another engineer had made an evaluation of the ground but that you wanted an independent evaluation and that you didn't care that I knew what the results were of the previous engineer's work.

Q. Were you told of the previous results prior to your investigation?

A. No, sir; I didn't know what they were.

Q. What did you do when you went upon the ground, Mr. Mathews?

A. I rigged up some of the stuff around there for a place to pan and sized up the dump, and decided that probably two different generations of material were present, and that I would sample the two portions separately.

Q. What led you to that conclusion?

A. If you will look at the photograph——

Q. You may illustrate on the photograph and you may step down.

A. If you will look at the photograph here you will see that there is a pile of material here (indicating) and that there is another pile on the other side and that in between is what I consider to be a later pile, right in between there (indicating).

Q. And then what did you do?

A. When I found that, what I consider to be

(Testimony of Ted C. Mathews.)

the later material piled up there, I dug five holes, one at the top and one toward the base of each perimeter of the pile. That would be four around the small pile on top and one in the center. Those were dug approximately one foot deep or a little deeper and then two pans were taken from the bottom of each hole and panned out.

I counted the colors in each pan and put these concentrate samples with the colors in a separate container and kept the materials obtained from the upper portion of the pile separate from that obtained from the lower portion and I weighed it out separately, and those samples of the gold that I got I brought along (producing vials).

Q. Do you consider your method of sampling of that pile or dump to be a representative sample?

A. Yes, sir; I do.

Clerk of Court: Defendant's Identifications L and M.

(The two vials produced by witness Mathews were marked Defendant's Identifications L and M, respectively.)

Q. (By Mr. Cole): When you observed the dump, did you notice any other holes or excavations had made in it?

A. Yes, it appeared that someone had done a pretty thorough job of sampling it prior to my arrival. [308]

Q. Did those holes and excavations represent an adequate sampling of the dump, in your opinion?

Mr. Taylor: Just a moment. We object to that,

(Testimony of Ted C. Mathews.)

Your Honor, on the ground that it is entirely incompetent, irrelevant and immaterial, as to what he thinks somebody else did.

The Court: He is testifying as to his opinions based on what he saw, and it may stand.

A. In my opinion, the dump was adequately sampled, yes, sir.

Q. (By Mr. Cole): I hand you Defendant's Identification L, Mr. Mathews, and ask that you observe it, please.

(The witness examined the proposed exhibit.)

Q. Have you observed it? A. Yes.

Q. Can you identify it? A. Yes.

Q. What is that?

A. That vial contains the gold that was panned from the upper portion of the dump and contains 136 milligrams. There were ten pans of material represented in that extraction.

Q. Ten pans? A. That is right.

Q. I hand you Defendant's Identification M and ask you to observe that, please. [309]

(The witness examined the proposed exhibit.)

Q. Have you observed it? A. Yes.

Q. Can you identify that?

A. Yes, this vial contains the gold that was panned from the lower portion of the dump. It contains 73 milligrams and represents the concentrate from 12 pans which were taken from six holes in the lower portion of the dump.

(Mr. Cole handed the proposed exhibits to Mr. Taylor.)

(Testimony of Ted C. Mathews.)

Q. And then what did you do, Mr. Mathews, in the sampling and evaluation process?

A. Well, as I was saying, the sampling was carried out separately from the two portions of the pile and the concentrates were kept separate in the two portions and the concentrates were cleaned—later they were brought in and cleaned in my office at home and weighed. An estimate, although it wasn't my understanding that I was to make an accurate estimate of the quantity of material in the pile, I did make some measurements and concluded that the upper portion, that is, what I considered to be the later material, contained 22 cubic yards and that lower part of the dump, that which I considered had been cleaned up previously to the extent that it could flow to the boxes, was about 420 yards or 410 yards, if I recall.

Q. Did you determine the value per cubic yard of the gravel in what you call the upper [310] dump?

A. Yes, my valuation was for the upper part of the dump, that is, what I considered to be put there later, was \$2.04 per cubic yard, and that from the lower position was 90 cents per cubic yard.

Q. How did you reach that determination, Mr. Mathews?

A. Well, these pans that I took contained a given volume of gravel. The way I take them there is 150 pans in a cubic yard, and the total amount of gold that was extracted in one case from ten pans was weighed and calculated against the quan-



(Testimony of Ted C. Mathews.)

tity of gravel used for the samples and the value per cubic yard determined in each case.

Q. Perhaps I was not attentive, but did you state the value per cubic yard in the lower part of the dump?

A. In the lower part of the dump I got 90 cents per cubic yard.

Mr. Cole: That is all, Mr. Mathews.

### Cross Examination

Q. (By Mr. Taylor): Mr. Mathews, do you know where that material came from that you sampled?

A. I wasn't there when it was dumped there, but it had to come out of the shaft because it was underneath the guy line of this——

Q. Now, on that later material that had been piled on there, did that consist mostly of schist?

A. I would say schist gravel and schist bedrock and decomposed bedrock.

Q. And did that look to you to be put there at a later time than the bigger part that was underneath?      A. Yes, sir.

Q. Had you ever been on the Eastern Star Claim before, Mr. Mathews?

A. I don't know the name of the claim, but I was on it. I had never been at this particular operation before, although I had been at Fish Creek a good many times.

Q. You don't know, then, whether that is the claim that is the subject matter of this suit, then?

(Testimony of Ted C. Mathews.)

A. I don't know the name of the claim, no. I was just asked to sample the dump.

Q. And were you paid for it, Mr. Mathews?

A. Yes, sir. I haven't been paid for it yet, but I will.

Q. You hope or expect?           A. I will.

Q. What were your charges?

A. My consulting fees are the same for every one, \$100 a day.

Q. I suppose, getting a consulting fee like that, you have a certain loyalty to your client?

A. No, sir, a mining engineer is asked to go out and do a job and get the facts. He is paid for facts. That is the reason [312] that he is hired by people. There is no particular loyalty to a client, no, except to do the best job that you can for him to arrive at the best accurate conclusion you can.

Q. Isn't it a fact that these samples you took were practically all surface samples, were they not?

A. No, the samples were from a depth of from one foot to one and half feet below the surface of the dump. Of course, the material on the dump originally did come from underneath in the mine.

Q. And did it show it had been there for a number of years?

A. Yes, I would say it had been there for a considerable number of years.

Q. But it seemed to be two different generations of material, one had been there longer than the other; is that right?

(Testimony of Ted C. Mathews.)

A. That's right. I would not want to say how much time elapsed between the two piles. I wouldn't say from the looks of the windrows, I wouldn't say it was long. I would say not more than a year apart or probably less.

Q. And now, wouldn't it be possible that when a dump is broken schist and gravel that the gradual weathering, the rains, and the melting snows and the freezing and thawing, would cause the heavier stuff to kind of percolate down between that gravel just the same as it does when it is deposited in a [313] creek bed or in a crevice some place?

A. Well, sir, I would say you have two entirely different conditions. When you take a pile of gravel schist and bedrock and decomposed bedrock or clay such as you have in a pile and it is subjected to rains and thawing and freezing, there may be some washing off of a portion of the material that is on the top of the pile.

As the lighter material was eliminated, then you would tend to get a concentration of gold at the surface. That is the reason that the holes were dug deep enough to get away from any possible surface segregation.

The gold could not penetrate into the pile because in order for it to be dislodged, one would first have to move the lighter material from the pile in order for the gold to work down, the same as you do in a gold pan.

When these pay streaks were formed here, the

(Testimony of Ted C. Mathews.)

bedrock, or the pay is on bedrock and is moved ahead on the pay streak as the gravel erodes the bedrock surface and it works ahead. In the Fairbanks district these pay streaks are practically all on bedrock.

Q. And these pay streaks sometimes, do they extend over a considerable area, that is, not an area, but for a considerable length, do they not?

A. Yes, in the case of some of the creeks, such as Gold Stream out here, the length of the pay streak is measured in miles [314] and they are within perhaps a mile.

Q. Now, Mr. Mathews, we have here underground workings of the Eastern Star Claim. It shows a shaft here 93 feet deep, and at the base of the shaft is an abandoned tunnel, which was evidently mined out, and from here on out here, the broken lines indicate drifts that have been abandoned. Then the drift was carried over here and out here (indicating) to a drill hole and then they came back and up to here and over to where the plaintiffs found gravel that went from fifty cents to a dollar and half a pan.

Mr. Cole: That is their testimony.

Mr. Taylor: What?

Mr. Cole: I was saying that is their testimony.

Mr. Taylor: That is their testimony until proven otherwise.

Q. (By Mr. Taylor): (Continuing) So they then, when they found that pay, then they went



(Testimony of Ted C. Mathews.)

up 30 feet along that pay line, 30 feet to the other side and along the face of that pay there they——

Mr. Cole: Your Honor, I am going to object to Mr. Taylor's recital of the evidence. If he wants to ask the witness a hypothetical question, I will be happy, but he recites the evidence.

The Court: Yes, I think you can put the question, Mr. Taylor. Proceed.

Q. (By Mr. Taylor): And they sampled along the—— [315]

Mr. Cole: The same objection.

The Court: Yes. You see the objection is that instead of asking a hypothetical question you are relating your theory of the evidence.

Mr. Taylor: Oh, no, your Honor. Just what was testified to. It is not a hypothetical question, your Honor. It is putting the evidence into a question so that this witness will have an intelligent knowledge of what was done and what was found and then ask him from that what would be his opinion.

The Court: Well, you proceed, subject to objection and ruling.

Q. (By Mr. Taylor): (Continuing) Now, then, that was panned intensively and those value ran the full 60 feet of the face. Then the hose, the pipe and steam was brought in and they put in 10 points and they thawed in there 12 feet and, as they thawed and removed the muck, they continuously panned and the same values——

Mr. Cole: Now, I make the same objection, your Honor, that it is not a question. It is relating

(Testimony of Ted C. Mathews.)

the evidence. I would like to allow him to continue but he just doesn't put it in a question form, so I object to his continuing reciting the evidence.

The Court: Yes. I don't see that you are coming to a question, Mr. Taylor. What you are doing is giving a resumé of the plaintiffs' evidence.

Mr. Taylor: Yes, that is what I am doing, your Honor. [316]

The Court: Proceed.

Q. (By Mr. Taylor): (Continuing) And that upon removing this first 12 feet which they thawed along the entire face of the pay streak, they found that the values had increased.

Now, with a showing like that, Mr. Mathews, would you, would it be your opinion that this pay shown might extend indefinitely out to the boundaries of the claim and also extend indefinitely the other way?

A. Well, sir, I would say that without other evidence, no. In order to evaluate a pay streak, you are trying to determine a volume of material. In order to get a volume, you have to have three dimensions.

Q. That's right.

A. If you can block out a block in three dimensions with some values which you can average, then I would say you have every reason to believe that that would be the value of that block, providing you have enough sample, but——

Q. Well, now——

Mr. Cole: Let him continue the answer, please.

(Testimony of Ted C. Mathews.)

The Court: Yes. He was asked a question.

Mr. Taylor: Go ahead, Ted.

A. (Continuing) Where you have values on one side of a block or at one position in the pay streak, I don't think that you can definitely project those values throughout the block. [317] In other words, you have to have, as we say, three dimensions. It would be evident that it would be a good idea to put some more drill holes out there to find out. That would be my opinion.

Q. Now, Mr. Mathews, along that line, I will carry that a little further. They did remove——

Mr. Cole: I am going to object on the ground that if he wants to ask a question, it is perfectly all right, but to argue the case to the jury again and over and over is prejudicial.

The Court: I don't think it is right to keep re-hashing the testimony.

Mr. Taylor: Your Honor, now I want to call the Court's attention to the fact that Mr. Mathews said if he had three sides he could answer the question better. I was just going to elucidate that we did have three sides, that we took out a block of ground six feet high, 60 feet long, and 12 feet back.

The Court: Then ask him the hypothetical question, if the evidence shows that.

Mr. Taylor: Yes.

Q. (By Mr. Taylor): If the evidence showed that we did remove a block of that gravel and muck that was frozen, of course, six feet high,

(Testimony of Ted C. Mathews.)

12 feet back, and 60 feet long, and the value still maintained, do you think it would be profitable to pursue that mining at fifty cents to a dollar and a half per pan? [318]

A. I wouldn't know, Mr. Taylor, because you have taken, as I understand your description, you have taken a good sample along 60 feet of the drift. Now, if you were going to extend that into an area where you had no drill holes, then I would say you didn't have the ground evaluated, no, sir.

Let me show you what I mean.

As I understand, this 60 feet was drifted out (indicating).

Mr. Cole: Mr. Mathews, could you step to one side and let the jury see?

A. (Continuing) This 60 feet was drifted out. Now, the question is to what extent does the gold recovered from this 60 feet evaluate the block of ground from this limit (indicating) to this limit of the creek; is that right?

Q. (By Mr. Taylor): That is right.

A. Then, I would say it evaluates this block, and would be a good reason to put some drill holes out here (indicating), out here (indicating) and back here (indicating), where they were going to drift, to find out whether those values extended out to make enough volume to justify the mine.

Q. If we could get \$94.50 a yard, do you think it would be feasible to mine it?

A. What they mined, yes, but I wouldn't want



(Testimony of Ted C. Mathews.)

to project this valuation ahead in ground any distance.

Q. I mean that if—— [319]

A. Because——

Q. There is a possibility of that pay streak, though, extending a considerable way so it might reach out——

A. There is a possibility.

Q. It might extend both ways?

A. There is a possibility it may extend. We don't know, in this case. Let me say that I have mined ground that would go perhaps five or six hundred dollars a yard and ten feet away there would be nothing.

Q. I might also state that the samples were taken from the top six feet up and picked out of the muck down to bedrock. That is the way it was sampled. A. Yes.

Q. And what would you say as to such a showing as that? In your opinion, would that be a good showing?

A. It would certainly be a good showing. It wouldn't be evaluating the ground, in my estimation.

Q. For a big operation?

A. To go ahead and spend money on additional operations, no, I wouldn't.

Q. Well, if they were already working in there towards that and did find it and were taking it out, they should continue mining, shouldn't they?

(Testimony of Ted C. Mathews.)

A. For as long as they were taking out that kind of money, absolutely. [320]

Mr. Taylor: That is all.

Redirect Examination

Q. (By Mr. Cole): But you couldn't determine whether they would operate profitably as they continued?

A. As long as they had ground that went as high in value as Mr. Taylor speaks of, they could certainly make money, but they would never know when ten feet away they might run out.

Mr. Cole: That is all, Mr. Mathews.

Mr. Taylor: That is all.

(Witness excused.)

Mr. Taylor: Can we take the adjournment, your Honor?

The Court: I would like to have counsel remain, but first I would like to inquire of the defendant: can you state how many more witnesses you expect to call?

Mr. Cole: I think that is the defendant's last witness, your Honor, but I would like to reserve the final statement until tomorrow at ten.

The Court: No, I am not attempting to have you commit yourself definitely. I am merely trying to estimate how much time we have.

Mr. Cole: I believe that is our last witness.

The Court: Mr. Taylor, do you contemplate rebuttal witnesses?

Mr. Taylor: Yes, your Honor, I have possibly

two witnesses [321] on rebuttal. I think they will both be short, though.

The Court: I would like to have the jury go until tomorrow morning. Members of the jury, your duties today are concluded, and I ask that you heed the admonition I have previously given to you, and please report to your places at ten o'clock tomorrow morning.

(Thereupon the jury left the courtroom.)

The Court: Now, I want the record to show that the jury is gone, and I notice, Mr. Cole, that you did not offer Identifications L and M. Perhaps you had some good reason. There is no reason that you must, of course, have offered it by this time.

Mr. Cole: The reason I did not, your Honor, is because the Court stated that it wanted to reserve ruling on others and I thought we could take them in all together.

The Court: I appreciate that, and so now I am wondering if you wish to make the offer at this time and give counsel an opportunity to object and perhaps the Court can rule.

Mr. Cole: Yes, your Honor. The defendant moves for admission into evidence of Defendant's Identifications F through K, inclusive, and Identifications of Defendant L and M.

Mr. Taylor: To which the plaintiffs renew the objections, your Honor, upon the grounds stated before that there is no evidence to connect this gold in those piles with any dump that was taken out by the plaintiffs.

The Court: The reason I called it to counsel's attention [322] tonight before we adjourned is because I am very much perturbed about the offers, and I find the same thing is true with the testimony of the witness Ted Mathews. For some reason, counsel for the plaintiffs made no objection to all his testimony. He testified to his going to the mine and making the samples of these piles and testified as to the results and not one objection made to any of his testimony and, as a matter of fact, the only objection made is now made after the offer of the Identification, and I found that same thing true of the testimony of the witness Douglas Colp. The defendant sat back and let the witness testify to everything, and there was no objection made until the Identifications were offered into evidence.

I rather believe had counsel offered timely objections to the testimony of the witness Colp that I would have been inclined to sustain the objection to his testimony as to an evaluation that was made as recently as October 3rd, and of course what is true of the witness Colp would also be true of the witness Ted Mathews. I feel that the defendant had a duty to establish with more certainty that the pile was one and the same pile that was left by the plaintiffs, and I think that there is pretty scanty showing that it was the same pile that was examined by these two witnesses, and I think there is no showing that it wasn't tampered with. And I think that the burden is on the defendant to show, expecting to put in this type of evidence, that this



was one and the same pile and that it was in the same [323] condition as when it was removed by the plaintiffs, and it is a very serious matter. As I say, I am also perturbed because there was no objection made to the testimony of the witnesses. The only objection was to the Identifications.

That is a problem that perhaps you can help me with between now and nine-thirty tomorrow morning, because I want to rule on that at nine-thirty, and if you folks can give me some assistance, I assume that the defendant is going to argue that the matters raised by me go more to the weight than to the admissibility, but I am very concerned.

Mr. Cole: Your Honor, we are just talking about these exhibits or identifications.

The Court: That is what we are talking about now.

Mr. Taylor: Your Honor, I was under the impression that I cannot object until they are offered.

The Court: Certainly, you could not object to the Identification until it is offered in evidence, but what about the testimony? The witnesses testified to it all at great length without objection and that is all before the jury. They heard all that without any objection.

Mr. Taylor: I allowed them to testify because they hadn't identified the dump, your Honor.

The Court: The Identifications wouldn't identify the dump. You wouldn't wait until they get to the very gold itself. The testimony of the witnesses has been heard by the jury without any [324] ob-

jection on the part of the plaintiffs' counsel, so at nine-thirty tomorrow morning I will be glad to have you give me any assistance you can, either side, as to whether or not the Identifications are admissible in evidence, and Court will now adjourn until nine-thirty tomorrow morning. This case is continued until nine-thirty. Court will adjourn until nine o'clock.

Clerk of Court: Court is adjourned until nine o'clock tomorrow morning.

(Thereupon, at 5:20 p.m., October 16, 1957, an adjournment was taken until 9:30 a.m., October 17, 1957.)

Fairbanks, Alaska, October 17, 1957

Be It Remembered, that at 9:30 a.m., October 17, 1957, the trial of this cause was resumed, before the Honorable Vernon D. Forbes, District Judge:

Clerk of Court: Court is reconvened.

The Court: This morning, gentlemen, is there something we can accomplish at this time? It is now nine-thirty. The jury is to report at ten o'clock.

Let the record show the presence of Mr. Taylor and Mr. Cole.

First I might ask you: do you gentlemen have any requested instructions?

Mr. Taylor: I haven't right now, your Honor. I have some roughed up but my son is working on them at the present time and [325] they will

possibly be in condition to submit this morning or at noon, your Honor, or possibly before.

The Court: I would like to have you get them to me as soon as possible.

Mr. Taylor: I will as soon as we finish it. I will call and tell him you would like to have them as soon as possible.

The Court: Very well. Now, before ruling on the admissibility of Defendant's Identifications F through K and L and M, I will be pleased to hear from the defendant.

Mr. Cole: Well, first I think I should briefly state the evidence in the record. Actually, as to the Identifications, the testimony of the witness for the plaintiffs is that they left the dump out there when they left the property in 1942. The plaintiffs' evidence shows that a custodian was put on the property immediately when the Marshal came out, and remained there. There is testimony as to the size of the dump from plaintiffs' witnesses. There is testimony as to its location from plaintiffs' witnesses. There is testimony that the property has never been mined by the lessee of the property from 1942 to the present time, and there is testimony that there is a dump out on the property at the present time from which samples were taken. There is testimony that this dump is a matter of years old. It is difficult to predict its actual age. There is testimony that except for the top perhaps three inches the gold in a dump of this nature would not be affected by the elements in [326] the period of the years. There is

testimony that this mine froze up. It was frozen by November, by plaintiffs' witnesses, making it impossible to re-mine without six months' labor.

So there is testimony in the record, without objection from the plaintiffs, as to the operations, the sampling of the dump by the defendant's witnesses and the results of their samples that were offered as corollary supporting testimony to bolster the testimony of those witnesses.

What is the basic theory on which the defendant submits this evidence? It goes something like this, If I may use an analogy. Testimony that Mt. McKinley exists there today where it does is evidence of the fact that Mt. McKinley was there ten years ago, so the fact that there is a dump there now in the same location the plaintiffs' witnesses testified was the dump which they left certainly has bearing and relevancy that it is the very same dump which existed there ten years ago.

Yesterday the Court said, "Well, what about the proper foundation? There is no showing that this has not been tampered with."

Well, a Minnesota Court has held that an automobile tire which transferred through several hands and went to Minneapolis for repairs and back to another city from whence it came to Minneapolis was improperly excluded because there was no showing that it hadn't been tampered with. The Court says there is no such rule of law, no such requirement. The case is *Lestico* [327] v. *Kuehner*. That is 283 Northwestern 122. It is a Minnesota case decided in 1938.



It is also cited with approval at 136 Federal 2d, at 413, a Second Circuit case, in 1943, which incidentally also had to do with samples of aluminum ore taken, supposedly the same samples that had been shipped on a prior freight.

There is a little discussion of the theory of this in 2 Wigmore 437 (1). I will just read briefly. It says:

“When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period.

“The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree’s existence a year ago will indicate its continued existence to-day will vary according to the nature of the tree and the conditions of life in the region. So far, [328] then, as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.”

And Wigmore goes on to say:

“Similar considerations affect the use of subsequent existence as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin. On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; \* \* \*”

It says in the following paragraph:

“The opponent, on the principle of Explanation (ante, Sec. 34), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.”

I would like to just comment very briefly on the nature of the item. It is a large dump of gravel, in excess of 400 cubic yards. The probability that someone opened that mine, began operating it, is slight. The mine is on leased property, the Court would have to infer that somebody illegally trespassed [329] and operated the mine illegally, were this not to have any logical probative value.

It is also true that, considering the location in really a remote area of Alaska, there is much less probability that this dump has been tampered with

or is different than there is that many, many items of evidence which could have easily been tampered with or changed, and so forth, in a city or in criminal cases—much less probability, and I think the Court should also bear in mind this, that this is a case against a decedent's estate. The case itself was filed years after the alleged event.

In considering the difficulties of proof with which a defendant in a case of this type is faced, I think it is perfectly proper for a Court, if there is any question about evidence so far as its relevancy is concerned, to let the evidence in and let the jury decide whether it is probative or the degree of probative value which they want to give it, and give the adverse party, the opponent, an opportunity to explain it away and to show to the jury that because of certain considerations it is entitled to no weight, but I think that the defendant should have the benefit of whatever evidence it can produce as long as it is relevant, and not barred by an exclusionary rule of law.

Mr. Taylor: If the Court please, I have no quarrel with Wigmore. Never have. I think that the analogies that he has brought forth are true, but, your Honor, I think it is stretching [330] things too far to compare Mt. McKinley or Mt. Everest with a man-made dump eight or ten feet high and which is subject to being settled or being moved or being put through the sluice boxes at any time after the plaintiffs left the place.

First, I would call the Court's attention to the fact that neither one of the experts knew what

claim they were on. They said they didn't know. They were directed to go some place.

Another thing that Mr. Mathews—I have a lot of confidence in Mr. Mathews, and he testified that there was evidence of two generations of dumps, one younger than the older one.

Now, if we go back a little bit and analyze the testimony of the plaintiff Kupoff, let's see what they did. They arrived at the mine on the 22nd day of February of 1942. They immediately got the machinery in operation. They cleaned out the shaft, and then they started to clean out and bring to the surface sloughings in the tunnel and they were bringing them up, and I want to call the Court's attention to the fact that not until the latter part of May was there any opportunity to sluice any of that gravel. The first sluicing was in June, the latter part of May or June. That is what Mr. Kupoff said, and I think the dates of the clean-ups, of the deposits, would show that that is approximately correct, because I believe one was in the early part of June and one the 16th of June. That waste material was piled up there alongside the sluice boxes. This gin pole was up, your Honor, and the gin pole, they cannot swing it around any place [331] they wanted because the cables run down to the winch, and so they would necessarily have to, in the immediate vicinity, dump that waste material for a matter of some months.

So I have no doubt at all, if these two mining engineers were on the right property, but what



they were sampling some of the waste material that was taken out in the early part of the operations and which was not put through the sluice boxes because they couldn't put it through the sluice boxes, because there was no water in the early part of June, and I think also then the evidence of both Mr. Kupoff and Mr. Zukoev shows that when they got into what we will call the golden zone, their goal, that they had arrived at, where they were getting the big values, then they said they were putting all of that through the sluice boxes they could so that they could pay up the men and their bills.

The hopper was available for doing that as they were bringing that up. That is the ore they would naturally wash out. And we feel that the greater part of the proceeds of that gravel, gold-bearing gravel, was taken from the face of the pay streak, had been washed out, and the gold was in the sluice boxes, because they had some bills to meet, they had men working for them, and we feel, your Honor, that this sampling of that dump, if it was that dump, your Honor, would be samplings from the ore, or not the ore, but the material that was taken out in cleaning up the tunnel and driving through what was comparatively lean ground, although they did in three clean-ups, they got [332] \$1,100 in one clean-up and \$1,110 and \$1,296 in the third one, and then is when they hit this golden zone, and then they started to use that, and they would go out in the evening after they had dug 10 hours down below—not Mr. Kupoff, because Mr.

Kupoff was on top of the ground. He was doing the hoisting, taking care of the boilers and the winch and he was up there and he was the one that was doing the dumping of the ore, and he was the one that testified that they were dumping that in a hopper and putting it through the sluice boxes as fast as they could.

So I believe, your Honor, that the experts sampled that part of the material which was taken out of the drifts prior to the time they hit the pay streak, because they were trying to put all they could of the rich ore through the pay streak.

Now, Mr. Cole states that, "Well, who could have possibly ever done anything around there?" Mike Stepovich could have done it, your Honor. Mike Stepovich or others that were hired by him. Otherwise, why did Mike Stepovich by an illegal means, by an abuse of process of this Court, evict those men, eject them, take them off the ground. He took their food, everything that they owned except their blankets, and ordered them off. Did he do that just for the sheer love of being cruel or being sadistic? I think he did it, your Honor, because he knew that in those sluice boxes was a lot of gold. He knew that in the golden zone, in the pay streak, there was a lot more, and that is [333] what he wanted.

So there had been no contradiction of that evidence, your Honor. As it has not been contradicted, it must stand as the facts of the case.

We believe, your Honor, that the connection of these Identifications consisting of the little vials

of gold here is quite remote and it has not in any way been connected with the ore that was taken out of the pay streak by Mr. Kupoff and Mr. Zukoev and their associates. It might not be even from the same dump. Mrs. Stepovich said, yes, she said, there were three shafts on the place, but she didn't know, because there were four shafts on it. We know that. She said she doesn't know when that dump was there. She doesn't know when the picture was taken, and if it was taken in 1941, your Honor, that dump was there before the North Star Mining Company ever did any work, because if it was there in 1941, it was there in 1942.

The Court: I think her testimony was that it was not there in 1941.

Mr. Taylor: If the Court please, I believe, first, your Honor, the testimony was that this was a picture in 1941. That was the testimony.

Mr. Cole: No such testimony, your Honor.

Mr. Taylor: I believe that the counsel, himself, asked if that was——

The Court: I have a note that Mrs. Stepovich testified she [334] did not see the pile there in 1941.

Mr. Taylor: She did not testify that she saw it in 1942, your Honor, so we don't know whether that is the dump that the plaintiffs in this case got out or not, but apart from that, your Honor, that is so skeptical as to whether or not those samples were taken from the material from the high-grade deposit in that mine or whether it was from the material when they were driving the drifts to reach

the golden zone, and I don't believe, your Honor, that it would go to prove any of the elements of this case. I don't believe it would be a circumstance even that should be submitted to the jury in the fact that it was not shown by any competent evidence that it was connected in any way with the plaintiffs. It was an old dump and that old dump, your Honor, he said "many years," and then there was a later dump, and those are so intermingled, your Honor, that I think it would be requiring the jury to guess.

Also I would like to call the Court's attention in relation to this Exhibit 1, Defendant's Exhibit 1, we realize that in the operations prior to the time that Mr. Kupoff and Mr. Zukoev and their associates went onto the ground that there had been a shaft 93 feet deep sunk, a shaft seven by seven. That also in one direction that there had been a drift driven up to here (indicating) and another drift down into here (indicating) and another drift over here (indicating) about 75 or 100 feet. [335]

Your Honor, if that pile of stuff was not there, where did they put the debris, the gravel, and the dirt that came out of the shaft, those drifts (indicating) and that drift (indicating), if it wasn't piled up out there? Evidently Mrs. Stepovich at that time perhaps was suffering from astigmatism or some other eye trouble, because there would have to be a dump there. Your Honor, it couldn't be otherwise, unless they took wheelbarrows and scattered it all over the landscape, and I don't think



anybody would do that, your Honor. And we feel that this has not been connected up with this case sufficiently, your Honor, to allow that to be introduced as an exhibit.

Mr. Cole: May I make one remark, your Honor?

The Court: Yes.

Mr. Cole: I will be very brief.

First, Mrs. Stepovich testified that this was the Eastern Star Claim which her husband leased to the plaintiffs and we connected up the presence of the engineers that way.

I would like to say so far as the evidentiary point that arose yesterday in connection with the prior reported testimony and the admissions, I have authority for that proposition in McCormick, quite clear-cut, I think. I would like to introduce one statement in this transcript if I were allowed to cite that authority to the Court. If the Court approved the authority and allowed the admission into evidence of the prior statement of Mr. Kupoff, I think it would make this point clear. I would like [336] to cite that authority to the Court.

The Court: I will give you an opportunity to cite at this time from the transcript the admission that you contend was made by the party, so that I can determine whether or not it is an admission or whether it is pertinent.

Mr. Cole: Thank you.

The Court: Or whether it would be admissible under any rule.

Mr. Cole: On page 58 of the official transcript,

in answer to a question which is apparently up here:

“Q. Now, did you mine any of the dirt out of it, where you had struck it rich, where you got the rich pan?”

Following several objections between counsel, it says:

“A. Yes, we just begin start work on the face and what gravel is left out there was where that come out of that good pay.”

I would like to introduce that into evidence, also the other statements that they left it out there and don't know whether it was ever washed up by anyone.

The Court: Well, am I to construe your remarks this morning as a new offer of proof?

Mr. Cole: Yes, your Honor. That is true.

The Court: Well, I will deny the offer.

I am now going to the ruling on the objections to the offer [337] in evidence of Defendant's Identifications F through K and L and M. I don't know that I can accurately judge of myself, but I think that I am inclined to be liberal, perhaps too liberal, in letting evidence get before the jury that may be helpful to the jury in determining these serious matters, and the question before me is whether these Identifications in question should be permitted to go before the jury and whether or not they would be helpful in any way, and I am afraid that they

do not have the degree of accuracy that evidence should have.

In the first place, the dump was left there in 1942, 15 years ago, at which time an analysis might have been made.

The lawsuit was commenced about ten years ago. I believe the analysis could have been made at that time. I am not meaning that it must have been made then or it wouldn't be admissible, but when the defendant, who had an opportunity to have the analysis made during all of these years, comes in with such a late analysis, I think it is incumbent upon such a party to offer evidence that has a degree of convincingness that the pile that was analyzed was one and the same pile as left by the plaintiffs and that some evidence tending to show that it was in the same or similar condition as when it was left. I think the evidence is far too speculative and unreliable, and therefore I will sustain the objections to the offered evidence.

Now, I would like to check time with you gentlemen, not having a clock in the courtroom. [338]

Mr. Taylor: I have five minutes after ten, your Honor.

Mr. Cole: That is my time, your Honor.

The Court: Very well, I will adjust mine accordingly.

Are we ready for the jury now?

Let the jury, please, be brought in.

Mr. Taylor: If the Court please, could I have just a moment to call my son to tell him about the instructions that you might want?

The Court: Very well.

Mr. Taylor: I will just be a second.

The Court: We will take a five-minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon a five-minute recess was taken.)

(The jurors were brought into the courtroom and resumed their places in the jury box.)

Clerk of Court: Court is reconvened.

The Court: Would the parties like the roll call of the jury this morning?

Mr. Taylor: We will stipulate that the jurors together with the alternate are all present, your Honor.

Mr. Cole: And the defendant waives roll call.

The Court: Very well.

Mr. Cole: The defendant at this time rests, your Honor.

Mr. Taylor: The plaintiffs rest, your Honor.

The Court: Well, both parties having rested and neither party having yet requested any instructions, I assume that there will be some matters to be taken up out of the hearing of the jury.

Mr. Taylor: Yes, your Honor. I got in touch with my office a few moments ago and my son will be over in just a moment with the requested instruction that might be helpful.

Mr. Cole: Yes, your Honor.

The Court: I am thinking now of letting the jury go until two o'clock, hoping that we can be ready for summation at that time. Can anybody



suggest any better way of making use of the time without keeping the jury?

Mr. Taylor: I think, your Honor, that would be a very proper procedure. I don't doubt that the Court will have certain instructions and also would like to study any requested instructions. It is kind of unexpected that we rested this morning.

The Court: Yes. I didn't contemplate that there would be nothing for the jury so far today. I am hoping, of course, that there will be no delays at two o'clock, so that we can go right on.

Mr. Taylor: There will be no delay on the part of the plaintiffs.

Mr. Cole: The defendant is ready to proceed at this time, if Mr. Taylor is, to proceed with final argument at this time. I don't see any special reason for excusing the jury until two.

The Court: I assumed you had a motion. [340]

Mr. Cole: Yes, your Honor, which won't, I suppose, take too long, but I will leave that to the discretion of the Court.

The Court: I suppose counsel would like to know something about the instructions before arguing, and I know that I insist that I have your requested instructions; as a matter of fact, I should have had them before this.

Members of the jury, please heed the admonition I have previously given to you, and will you please return to your places at two o'clock?

(The jury left the courtroom.)

The Court: Now I am going to ask a question of

counsel. How soon can you have your requested instructions to me?

Mr. Taylor: I have just called the office and my son has got the short one. It was being typed up and I expect him over any time.

Mr. Cole: I don't think the defendant will have any requested instructions, your Honor.

The Court: Well, Mr. Cole, at this time, do you have a motion you wish to make?

Mr. Cole: Yes.

Well, at this time the defendant moves for a directed verdict for the defendant on the ground and for the reason that the plaintiffs have failed to prove any loss of profits and that there is not before the jury a prima facie case sufficient to submit to the jury. At the close of the plaintiffs case, this same [341] motion was made and decision was reserved on it.

I don't feel that there are many things to say in addition to what was said at that time. The plaintiffs' proof at that time was inadequate to show loss of profits and, in addition to that, your Honor, defendant's evidence through three qualified mining engineers was that there was no way, no possible way, to determine the gold-bearing content of ground beyond that which has actually been exposed and mined.

Mr. Mathews said, yes, that certainly it might have been \$94 a cubic yard where they were, but he said you never know whether ten feet beyond or one foot or two feet beyond there is nothing.

That was brought out in the testimony of Earl

Beistline showing the general characteristics and formations of placer mining deposits in the Fairbanks area and because of the way in which they are formed they have no ribbon flow, no continuity, and it is impossible to determine whether ground even contains gold unless it has been blocked out in three dimensions.

The testimony of Mr. Mathews is quite clear. Let me add that not one of these witnesses' testimony was shaken one iota on cross examination. There is no evidence as to how much gold-bearing gravel could have been recovered by the plaintiffs had they been allowed to continue operation of the mine, not one bit.

It is the testimony that not only must there be one or two [342] drill holes but there must be a block on 25 or 50 foot centers. No evidence of any drilling, no evidence of any sampling, no evidence ever has been presented by the plaintiffs with regard to the costs of the mining operations except that they had spent six thousand dollars or seven thousand dollars in the operation of that mine between February, 1942, and the time that they left the property.

The only showing is, your Honor, that they operated at a profit while they were operating—or at a loss. The only showing is that they operated at a loss of about three thousand dollars. That is our own proof.

There is no proof that had they been allowed to continue mining that they wouldn't have continued to have lost money, although it may appear from

their testimony that in the actual ground they were in there at that time they could have operated profitably.

There is no testimony of what would happen had they been allowed to continue. So I recite to the Court the cases earlier cited in connection with loss of profits and point out that those profits must not be uncertain and they must not be remote and they must not be speculative, and how can a jury, from the evidence they have before them, decide what the plaintiffs' loss of profits were, if any?

I reiterate, Courts have said there must be a past profitable showing which can be projected. There is no evidence of that. [343] And any jury, any person, attempting to ascertain whether or not the plaintiffs would have suffered a profit or a loss, or if a profit, how much, would be doing nothing but just sheer guesswork, conjecture, speculation as to whether they would have made one penny or lost their shirt.

At this time the defendant renews its motion made at the close of the plaintiffs' case and moves for a directed verdict at the close of the evidence.

The Court: I am going to reserve ruling on the defendant's motion for directed verdict, and in so doing I feel it proper to mention that I believe the motion has a good deal of merit, for several reasons.

I will submit the case to the jury with some misgivings, because I doubt whether the evidence is such that the jury could arrive at a just and proper verdict other than for the defendant.

I say that because there are so many things that



appear to me to be lacking in proof, and the burden of proof is on the plaintiffs. I think the evidence is unsatisfactory as to the value of the gold that was actually mined. I think that the evidence is unsatisfactory as to the quantity or quality of the gold that remained in the drift at the time they desisted or quit their operation. I think the evidence is unsatisfactory as to the amount that might have been recovered, the amount of gold that might have been recovered by the plaintiffs during the remainder of the lease. Those things trouble me terribly and [344] I think that there is a lack of evidence of what the cost of the recovery would have been to the plaintiffs. All those things are in very grave doubt, and I have difficulty seeing how a jury could reach an intelligent verdict based on the evidence.

The jury I don't believe can guess as to the depth of the vein that was struck. I don't believe they should be permitted to speculate that it may have gone back 100 feet or to the left a mile. I don't think they should be permitted to speculate as to how much might have been mined had it not been for the interference of the defendant, because those things, I believe, must be spelled out in more particularity for a jury, and I am troubled, but at this time I will reserve ruling.

Mr. Taylor: If the Court please, I believe if the Court would call upon me, I believe I could resolve that doubt.

The Court: At this time I resolve the doubt in favor of the—the doubt is in my mind and I ex-

pressed it, but you see, in reserving the ruling, I have resolved the doubt in favor of the plaintiffs at this time, so there is no object in calling on you for argument, because I have resolved those doubts in favor of the plaintiff in reserving the decision on the motion.

Mr. Taylor: I do have some cases right in point regarding mining along that line, your Honor, if the Court would like to listen to these cases.

The Court: I don't know if I have time to do that, but I [345] would be very happy to have your cases even at this late hour.

Mr. Taylor: They are all marked, your Honor.

The Court: On what point do the cases you have now bear, Mr. Taylor?

Mr. Taylor: As to values, and these cases hold that values in other parts of the mine can be considered by the jury, who are to assess damages, as being equivalent to those ores that were taken, just the same as we attempted to prove here that on the same pay streak——

The Court: We are talking now about the evidence that has been received as to whether or not it is sufficient to submit the case to the jury, and we are not now arguing——

Mr. Taylor: That would go to the evidence, your Honor, because I believe in this case we have the evidence of the engineers, who talked about these drillings, and all that. We have before us, your Honor, complete drillings, every twenty-five feet.

The Court: But they are not in evidence, Mr. Taylor.

Mr. Taylor: I know they are not in evidence, your Honor, but counsel complains they are not in evidence. When they were here he objected and didn't want them in evidence because he knew what they would show.

Then the next evidence, your Honor, is, as the mining engineers say, and I believe they are right, they make these borings and then what do they do after the borings? They pan the results. [346] So after all it comes back to the old gold panning the miners used from time immemorial, and so then what is the difference?

The Court: The difference, Mr. Taylor, is this: according to the testimony in this case the plaintiffs panned the gold that they took down from the surface, instead of panning or testing the gold beyond the surface. That is the difference.

Mr. Taylor: No, your Honor, I think that doubt should have been resolved by the Court because they not only, as they went into the face of the pay streak, that they would scrape this down—I want the Court to remember that this stuff was all frozen. It is a hard surface. So they scraped that off from six feet up from the ground to the bedrock and then they panned that and they see what it is. As they go in, they keep on doing it and they go clear across the face of it, but then they take out a block of the gold-bearing gravel six feet high, twelve feet wide, and sixty feet long. That is a proven value, your Honor, and that went, at the least estimate, would be fifty cents a pan. That is proven. There was nothing to contest that. That is

not only blocking that ore, but it is taking it out. It has been taken out and the testimony is here and it is undisputed and it was put through the boxes. They put it through the boxes because they wanted to get the money so they could pay their men. So you can't discount that one block there of six feet wide, by twelve by six feet. And they also then had another thaw in, and that was going on at the time that the Marshal came down and threw them [347] off and, as Mr. Mathews said, why, if they got values like that they should continue because they have got a good thing and they could make a good profit out of it.

The Court: Mr. Taylor, he did not say they should continue because there is gold beyond there. He said they would be justified in taking samples to determine it, and of course they would continue as long as they were getting this rich dirt.

Mr. Taylor: That is right.

The Court: But that is just the surface. There was no testimony of what was beyond the surface.

Mr. Taylor: Your Honor, they had proved it by taking out that where they left off, as they went 12 feet in they were in even better pay, according to Mr. Kupoff.

The Court: We have the testimony of what they were in, but we don't have the testimony of what was beyond what they were in. The testimony is here as to what they were in.

Mr. Taylor: But I would like to call the Court's attention to the fact that if that particular area showed these values, that the jury then can take



that into consideration as to saying whether or not there were other values.

Now, that is a Supreme Court case, your Honor, because where something is done with malice, such as was done in this case by the defendant, and it is difficult to establish the exact amount, that the jury has the right to consider from the value that has been placed on that that has been taken out, that [348] the same values would prevail in the other mining operations adjacent thereto.

The Court: How far?

Mr. Taylor: Until they run out of the gold.

The Court: Exactly.

Mr. Taylor: Yes, sir, and I want the Court to understand, though, in figuring this matter out, that block of material that they took out of there, is pretty close to \$16,000, your Honor, and we contend there was approximately \$16,000 in that sluice box, when they then were forcibly and unlawfully and maliciously ejected from the property.

We can show that to the jury from the values put on at the lowest pan that they got, which was fifty cents, and from fifty cents to a dollar, and the jury can say that there was an average of 75 cents a pan. It is for the jury to decide these facts.

The Court: The jury decides the facts, certainly, if we give them enough evidence to go on so they can base the decision on the facts.

Mr. Taylor: There was a late case, your Honor, *Schultz v. Pennsylvania Railroad*, the Supreme Court of the United States. That is in 76 Supreme Court 608, and it is the modern concept of the prov-

ince of the jury, even if they are disputed facts and they are circumstances that might be arrived at by the jury, should be allowed to go to the jury. They should let the jury's thoughts be heard on this matter. Even if there was an inference to be [349] drawn or an inference not to be drawn, the jury is the one to do that, your Honor.

The Court: I am going to ask you at this time, Mr. Taylor; I asked you yesterday: This is a suit for loss of profits, is it not?

Mr. Taylor: Yes, your Honor.

The Court: And what is your theory relative to the \$6,700 expended by the plaintiffs?

Mr. Taylor: Your Honor, I have two cases right directly in point, and they are mining cases, and they say in assessing the damages that the cost of operation of taking the money out is not to be considered where the taking was unlawful, by trespass, or in a case like this, by malicious ejection, and I would like to have the Court take a look at it.

The Court: I would like to have your citation, Mr. Taylor.

Mr. Taylor: This was a Supreme Court case, your Honor. It is the case of Benson Mining and Smelting Company v. Alta Mining and Smelting Company. It was a case in which——

The Court: Reported where?

Mr. Taylor: That was reported, your Honor, in Supreme Reporter, let's see, 145 U.S. at page 428, and it is reported in the Lawyer's Edition, 36 Law Edition, at page 765.

The Court: What do you contend the holding of that case is?

Mr. Taylor: That in this case, your Honor, the only other question is as to the measure of damages of a property something [350] such as this, where they took the ore out surreptitiously and trespassed. "The only other question is as to the measure of damages. The trial court found that the value of the ores, at the time of their conversion by the defendant, was \$11,716.65; that after the ores had been mined, and became chattels there had been expended by the defendant and others, in removing the ores from the mine, in assorting the same from the worthless rock, and in transferring the same to the smelter, the sum of \$7,985.83; and gave judgment for the difference, to wit, \$3,730.82, and interest. It also found that the entries and trespasses upon the Alta mine were with knowledge of plaintiff's ownership thereof, and that the defendant at the time it received the ores had knowledge that they came from the Alta mine, and were the property of the plaintiff; and there was testimony to support these findings."

"The contention of the appellant is, that there was error in not crediting it also with the cost of mining the ores. But as it received and converted them with knowledge that they belonged to the plaintiff, the ruling of the trial court was, within the decision in *Wooden-ware Company v. United States*, 106 U. S. 432, as liberal to the appellant as it had a right to expect."

In that case they did not allow them the cost of

removing it. We feel this could come under that, and we have another case along the same line. [351]

This is the one in Strathmore Coal Mining Co. v. Bayard Coal & Coke Co. It says:

“The measure of damages fixed by the first paragraph does not apply, if the party taking the coal was negligent, because it is only in the absence of fraud, negligence, or willful trespass that the rule applies. If ‘negligence’ as used in the first paragraph, is not embraced in one of the terms ‘furtively or in bad faith,’ as used in the second paragraph (and it would scarcely be contended that it is), then there is no part of the statute applicable to a case where there was negligence, and if it is included, then the appellant cannot complain of the measure of damages allowed, as it even got the benefit of the deduction for the cost of removing the coal to the mouth of the mines. But it is clear that the statute does not change the rule when the minerals are taken as the result of the negligence of the defendant.”

“Therefore, as the statute does not apply to this case, the measurement of damages applicable thereto is that which existed prior to the passage of the act, which is clearly stated in Barton Coal Co. v. Cox \* \* \* ” “that the plaintiff is entitled in cases of this character ‘to recover such sum per ton as the jury may find the said coal so mined was worth first severed from its native bed, and before it was put upon mine cars, without deducting the expense of severing said coal from its native bed.’ ” [352]

That is the Strathmore Coal Mining Co. v.



Bayard Coal & Coke Co., 116 Atlantic, and the case starts on page 570.

So we feel, your Honor, that this was an illegal, malicious abuse of process for the purpose of ejecting the plaintiffs from this mine, that the defendant cannot be given any credit for the cost of operations. The plaintiffs are entitled to recover not only what they had expended but the anticipated profits also.

That is what these two cases contend, your Honor. Otherwise it would allow the defendant to profit by his own illegal acts.

The Court: Do you wish to be heard at all Mr. Cole at this time?

Mr. Cole: No, your Honor. I think those are trespass conversion cases and are not applicable here.

The Court: Now, gentlemen, I must of necessity place a deadline on requested instructions.

Mr. Taylor: I can give you these two (handing them to the Court.)

The Court: Have you served these on counsel for the defendant?

Mr. Taylor: I am going to give him a copy.

The Court: Get him to initial them.

Mr. Cole, I will give you until eleven-thirty.

Mr. Cole: Thank you, your Honor. [353]

The Court: I am thinking, gentlemen, that I might, at least I am going to try to have my proposed instructions ready so that you each have a copy of them by one-thirty and, if I am able to do

that, I would like to have the objections to them prior to the argument.

Very well, this case will now be recessed until one-thirty.

Clerk of Court: Court is recessed until one-thirty.

(Thereupon, at 11:00 a.m., a recess was taken until 1:30 p.m.)

Clerk of Court: Court is reconvened.

The Court: The proposed instructions are being numbered at this time and should be here in a moment.

I would like to discuss for a moment Defendant's Requested Instruction No. 1. Has that been served upon you, Mr. Taylor?

Mr. Taylor: Yes, your Honor.

The Court: I would like to discuss this. The requested instruction reads as follows:

"The value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, is not to be included in any award of damages you might make."

That is the entire instruction as requested, and I would like to have an explanation from counsel as to the theory behind that request. [354]

Mr. Cole: Well, the theory of plaintiffs' case is an action for a breach of covenant of quiet enjoyment and they have sued on the contract theory, seeking recovery for loss of profits, and therefore the only measure of damage which they

are entitled to is damages for loss of profits. Any gold which might have been out there, and I don't personally think there is enough evidence to be any evidence that any gold remained out there, or if there was, that there is any evidence that the defendant converted it. But since the theory of plaintiffs' case is one for breach of contract and the contract measure of damages being applied is loss of profits, he is not allowed to come into court at this time and now claim that the defendant converted any of the gold out there. That is the theory behind it, your Honor.

Mr. Taylor: If the Court please, I can't follow the defendant's contention in this, because that would be equivalent to saying that as the defendant got away with \$15,000 out of the sluice box, why, the plaintiffs would have no redress in regard to that. That would be the loss of the gold, the loss of the income. That is the main part of this case. It comes under the compensatory damages and, if they extracted gold-bearing gravels, dirt, from the mine, which from a reasonable interpretation of the evidence in the case would amount to some \$15,000 or better, and the greater part of that which they had put through the sluice boxes, they were working day and night to get that through, because they wanted to get the money to pay up their [355] men and expenses in the operation, and they felt they needed that to do it. Some of it might have been left at the dump, but the fact is, your Honor, that the defendant, himself, attached the gold that was in the sluice boxes. The

defendant is in the best position to know how much they got and to come in here and say what it was. He took over everything. He attached the dump and he attached the gold that was in the sluice boxes. The notices on here, which are in evidence, show, your Honor, that he did. I think the Circuit Court understood that that was an unlawful breach of the contract, that he used unlawful methods to break the contract, and that he did so. That would put a premium upon him breaking the contract in the way he did by getting the gold that was in the sluice boxes and say, "No, you can't have that. That belongs to the defendant," but the defendant took over the entire Eastern Star Mining Claim, including the groceries, the oil, the fuel, the gold in the sluice boxes, the dump, and retained control of that, your Honor, and if he did not recover anything from the sluice boxes, I think the defendant has had ample time to ascertain whether or not he did, but with the values that we have shown which was in the gravel that was taken out, I think from that the jury can follow that to a logical conclusion and infer from that evidence that there was so much gold in the sluice boxes, and I think it would destroy the theory of the plaintiffs' case to say that the plaintiff [356] could not recover for the amount of gold that they had worked for and paid the expenses of getting out. In fact, that instruction would practically destroy the plaintiffs' case as to recovery or compensation for the breach of contract.

The Court: I always worry when my theory of



a case seems to differ so greatly from the theory of counsel for the plaintiffs, particularly in this case. On previous occasions throughout this trial I have attempted to find out from the plaintiffs the theory on which recovery of 6,700-some-odd-dollars should be permitted as well as the loss of profits, and I have never been satisfied as to the plaintiffs' theory, and as I read the complaint even on the loss of profits, there seems to be a cut-off date. The plaintiffs seem to think, "Now, we have expended sixty-seven hundred dollars up to the time we were evicted. We are entitled to that on some theory. We are entitled to that money, and we would have, had we not been evicted, we would have extracted or recovered \$150,000 in gold. We would have done that, and \$50,000 of which would go to the defendant, and therefore we are entitled to \$100,000," negating any theory that the expense of extracting the gold should be considered. It looks just like plaintiffs contend that the expense of operation had nothing to do with this case and, as I see it, the case is one for loss of profits, and I think the jury must take into consideration what gold was recovered before the alleged breach, what gold would have been recovered after the eviction, [357] and after determining the total amount that was mined and would have been mined and deducting therefrom the expenses of the operation and royalties, and thus determined the amount of plaintiffs' damages. That is the only way I can see this lawsuit.

Mr. Taylor: If the Court please, in the case I

cited this morning, it holds just directly where the taking was unlawful, the eviction was unlawful, and then he took this stuff unlawfully, that you don't have to set off the costs of that against the amount that would be recovered. They are not to take that into consideration at all.

The Court: Then your suit isn't one for loss of profits at all, under your theory?

Mr. Taylor: Yes, it is, your Honor.

The Court: What is a profit? A profit is the difference between what is taken out and the cost of getting it. That creates a profit, while you say that you recover the full amount which you think was in the ground, and I say I have difficulty in going along with that, and under my theory, I must reject the defendant's requested instruction, because under my theory of the case, and of course I hope it is accurate, the jury must determine how much gold was taken out, how much would have been taken out had it not been for the eviction, and what the expenses were in what was taken out and what they would have been in extracting the remainder. If that is true, why, of course, I [358] cannot give the Defendant's Requested Instruction No. 1.

So at this time I refuse that requested instruction.

So, of course, you gentlemen are going to be shocked, at least the plaintiffs, will be shocked, I presume, at my proposed instructions, and I want to give you ample time to go over them, and I will give you time to point out wherein they are

erroneous and make all the objections you wish.

I see no other way to instruct the jury at this time. Now I will give you gentlemen until five minutes of two. Court will recess until then.

Clerk of Court: Court is at recess until five minutes of two.

(Thereupon a recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, at this time are you prepared to state your objections to the proposed instructions?

Mr. Taylor: The plaintiffs are, your Honor.

The Court: Very well. I will hear from the plaintiffs first.

Mr. Taylor: These instructions are not numbered. It is a little difficult to call the Court's attention to them.

The Court: I thought they were. I am sorry.

Mr. Taylor: The pages are not. The instructions are, but the pages are not.

Our first exception to the instructions, your Honor, is to [359] Instruction No. 3, which appears on the third page of that instruction. I believe, your Honor, that the first paragraph, the second paragraph, and the third paragraph should be stricken, upon the grounds that there was no evidence adduced in this case to support the denial contained therein, and I think in that respect that the Court should instruct that the fact that the Court has set forth that they are denials, that that is no evidence that the denials were well taken unless there is evidence to support those denials.

It might be that the jury might consider that the mere fact the denial is made that it would be evidence that plaintiffs' allegations were not true.

The Court: Mr. Cole. Are you through, Mr. Taylor?

Mr. Taylor: Yes, your Honor, with that one.

The Court: Number three. I will hear from Mr. Cole.

Mr. Cole: I am confused, your Honor. My Instruction No. 3 is "Plaintiffs in their complaint," and then the second paragraph, "Plaintiffs claim," and the third paragraph, "Plaintiffs claim," and the fourth paragraph, "Plaintiffs claim."

The Court: Well, he is going beyond that, to the defendant—"Defendant denies."

Mr. Cole: I think there is no substance to the plaintiffs' objection. I surely think if we ever get into that, maybe we can strike all of plaintiffs' claims in the instructions.

The Court: Go ahead, Mr. Taylor, to your next objection.

Mr. Taylor: The next one, your Honor, is the second paragraph [360] of Instruction No. 6, that part which alleges that "plaintiffs are not entitled to recover for loss of profits unless you can determine with reasonable certainty the quantity of gold which was and would have been mined by the plaintiffs from the Eastern Star Mine over the term of this lease."

That much of it, your Honor, we feel that should be in that instruction, but the following sentence we believe is objectionable, your Honor, upon the



grounds that it is not a correct statement of the law, and we would ask that the next sentence, which reads as follows:

“Once you have determined the total value of the quantity of gold which was and would have been mined by the plaintiffs over the term of this lease, you must then deduct therefrom all rentals or royalties which under the lease were required to be paid to Mike Stepovich in the amount of one-third of the value of all gold which was and would have been mined over the term of this lease. You must also deduct from this value the costs of mining the gold which was and would be mined over the term of the lease, which costs include all the expenses of the operation of the mine and including as an element of such costs, the development and operational costs incurred by plaintiffs up to the time of their eviction.”

We feel, your Honor, in view of the two citations this morning directly to that point, that that does not correctly state [361] the law in regard to allowing for the amount that would have been taken out of the ground the cost of mining the same, and the Supreme Court case decided directly contrary to the Court's instructions.

The Court: That was a conversion case, Mr. Taylor, and I didn't consider it on all fours with this or as authority for this proposition.

Mr. Taylor: I believe it was in point, your Honor, and should have been considered by the Court.

The Court: Very well.

Mr. Taylor: O.K. Then, we pass on to Instruction No. 8.

“You are further instructed that the plaintiffs’ claim in the amount of \$6,791.29 for expenses in the development and operation of the mine up to the time of their alleged eviction is not as a matter of law recoverable against the defendant. These expenses are to be considered by you only as an element of costs in determining plaintiffs’ loss of profits as I have heretofore instructed you.”

We object and except to that, your Honor, upon the grounds that we feel it is not a correct statement of law. The Court errs in giving that instruction for the reason that a person, by the actions of the defendant, who unlawfully does an act to prevent him from going ahead with the mining of the property, cannot set up and get a credit on his damages of what the plaintiffs have expended on you might say dead work in developing and [362] placing the mine in a condition for operations.

That is also based upon one of the cases, your Honor, of the Supreme Court which we gave, and we feel that it should not be given. It is contrary to the law in this case.

That is all our exceptions, your Honor, to the instructions.

The Court: Very well, Mr. Taylor.

Mr. Cole?

Mr. Cole: Your Honor, the defendant has only one relatively minor objection. It occurs on the third page, the first sentence of which starts,

"Plaintiffs in their complaint claim." Going to the second paragraph, the first sentence of which reads:

"Plaintiffs claim that on the 21st day of August, 1942, Mike Stepovich, defendant's testator, wrongfully caused to be filed in this Court an action against the plaintiffs."

Then the next sentence is the one that the defendant objects to:

"At approximately the same time, Mike Stepovich wrongfully and unlawfully caused a writ of attachment to be issued \* \* \*", et cetera.

The Court: You mean it looked like a statement of fact?

Mr. Cole: Yes, sir.

The Court: I will correct it.

Mr. Taylor: If the Court please, I believe that reads properly, because the Circuit Court of Appeals has held that it [363] was a wrongful and unlawful detachment, your Honor.

I didn't follow the exact words of Mr. Cole's objection.

The Court: Mr. Cole's objection is: he said it was minor, that it looks like a finding of fact by the Court, rather than a claim of the plaintiffs.

That is your objection, isn't it?

Mr. Cole: Yes, your Honor. If you just put a comma after the words "plaintiffs" against the preceding sentence, "and that at approximately \* \* \*" that would cure that.

Mr. Taylor: That is all right. We would have no objection to that change, your Honor.

The Court: Very well. I am going to make the change with pen and ink; I am putting a comma after "plaintiffs" and making it read: "and that at \* \* \*"

Mr. Taylor: "Approximately."

The Court: Very well.

How much time do you want, Mr. Taylor, for argument?

Mr. Taylor: Your Honor, I must say, in view of the length of time it has taken to try this case and the number of exhibits of the plaintiffs has just about exhausted the alphabet, and many of them are very important, some of them are minor, and I will pass over very briefly, but I think in view of the importance of the case, your Honor, I would want not less than one hour.

The Court: Yes. I don't know a time when I have stopped any counsel from arguing, but I would like to have some gauge. [364]

Mr. Taylor: I might say, your Honor, it is possible that even putting that limitation on us, that we might want to ask for a few moments more in the event that we need it, but if the Court wanted to know just approximately, that is it.

The Court: That is what I wanted. Are you ready to proceed?

Mr. Cole: May I make one suggestion? This juror's chair (referring to alternate juror), perhaps it would be a little more convenient for counsel if it now were placed over there (indicating).

The Court: I think it is a little awkward there.



I wonder if the reporter's table could be moved a little and the juror's chair placed there.

Mr. Taylor, what do you think of that seating arrangement?

Mr. Taylor: I think that would be all right, your Honor.

The Court: Very well, the jury will please come in.

(Thereupon the jury was brought into the courtroom and resumed their places in the jury box.)

The Court: Do the parties wish the roll call?

Mr. Cole: The defendant waives it, your Honor.

Mr. Taylor: We will stipulate they are all present, your Honor.

The Court: Very well, you may proceed, Mr. Taylor.

#### Argument To The Jury By Mr. Taylor

Mr. Taylor: If the Court please, Mr. Cole, and ladies and gentlemen of the jury: After several arduous days in the courtroom, [365] we have now arrived at the time where the burden is going to be placed upon this jury and soon you are going to retire to the jury room and take into consideration the evidence that has been adduced from the witnesses and also from the exhibits that have been introduced into evidence, and also the Court's instructions of law which will be given to you at the conclusion of the arguments of this case.

I might say, starting, that this case has been going on a long time. The matters set forth in the

complaint occurred in 1942, between the 13th day of February, 1942, and the 22nd day of August, 1942, and that the original complaint filed in this case I believe was in 1945, and was tried in 1948 and went to the Circuit Court and back again.

Due to the Court's congested calender and the disqualification of certain judges, we were just now able to get this to trial, and I think by that long length of time that perhaps sometimes witnesses' memories have become a little bit blurred. I know mine would be, possibly some of the jury's would be, and that possibly the testimony as given, there might be some variations, but if there were no variations I would be very suspicious and skeptical as to their testimony, because I don't believe that if two persons or any person, for that matter, that gave some testimony nine years ago, that they can repeat it word for word or recall the instances recounted nine years later, that they are going to recall, because in the meantime [366] certain thoughts and images went through the mind that might have left a picture that might be just a little bit different than it was before. Time makes a great deal of difference.

Then there is only one other observation I wanted to make in this matter, and that is as a result of quite a number of years of experience, of over thirty years of experience, that this case exhibits, I think, to the jury and I know it is to me, one of the most flagrant cases of avarice and greed that has ever been brought to my attention. A total disregard for the rights of fellowmen. Very sel-

dom do you ever see men brought into a conflict such as the plaintiffs were in this case and subjected to the treatment that they were when they had gotten to the point after many arduous months of work and were on the point of realizing a good return from that work, when they were deprived of the fruits of their toil by a malicious and willful and wrongful act on the part of the defendant in having those men thrown off of the ground and could not come back.

I have tried to show in this matter that on the, and no doubt you are familiar with this, that this lease was executed on the 13th day of February, 1942, and evidently there was haste to get upon the ground on the part of Mr. Stepovich because he testified they must be on the ground within ten days after the execution of the lease.

We know that at the start of this operation there were three plaintiffs, Mr. Zukoev, Mr. Kupoff, and Mr. Drazenovich. [367] Mr. Zukoev and Mr. Kupoff were both miners and had been following that occupation for a good many years, both placer mining and quartz mining. Now, Mr. Zukoev had worked on the Eastern Star mine before. He knew the value therein, and Mike Stepovich also knew the values therein, and for that reason the royalty of  $33\frac{1}{3}$  per cent of the production of the mine was agreed upon as a fair royalty.

Now, there were other things in here, certain matters, one especially that you will have to bear in mind, was the fact that under paragraph four there was a 22 caterpillar tractor went with the

lease, but there was an additional compensation for leasing that cat, and \$250 was to be paid in July, 1942 and then the other \$250 on September 1, 1942. That is important to bear in mind, the fact that this caterpillar tractor was leased, was mentioned in this lease, and for the remuneration of the rental of \$500 for the full term of the lease.

Now, following the execution of this lease, the three partners, mining partners then contributed to the venture the sum of \$250 apiece, and then they went around, they were buying tools, they were buying mine rails, they were buying groceries, and other necessary articles with which to equip the camp on the Eastern Star placer claim, located about thirty miles from Fairbanks and on which they had this lease for that period that we have specified, February 13, 1942, to November 1, 1943, about a year and a half—a little over. [368]

They were required under the terms of the lease to be on the property in ten days. So on the 22nd day of February, 1942, they did go to—that is, as far as they could get by motor vehicle, Fairbanks Creek, and then they mushed in over the snow to their camp, a distance of about three miles in mid-winter, that was in February of 1942, and then in about a day they got a cat going that was there, and they came out, dozed a road out a bit, and then moved the rest of their stuff in, and immediately got the machinery in operation and began their work to put the mine into such shape that they could continue their drifting to the point at which they expected to find gold.



You have heard the description both by Mr. Kupoff and Mr. Zukoev as to the condition of this shaft, which was 93 feet deep and filled up with water and it was frozen, and the length of time it took for them, day after day working ten hours a day, to clean that up, and then when they got to the bottom of that shaft they went down one of the drifts and it had frozen, had a lot of ice in it, and quite a bit of the material, the walls, and the ceiling of the tunnel had caved in and that required cleaning out.

Now, they were hoisting this stuff up and were putting it on the dump, and as they drove on and on, they finally got to a point where they were approaching the proximity of where they felt that the pay streak was, but in the meantime the deceased, Mike Stepovich, told them about a drill hole which laid to the [369] right a certain place, if they would go over there they would find gold. Well, they did. They deviated from their course they were following and drove a drift over there and found out that the report was untrue, so they came back to their main drift and went back a little ways and drove across kind of in a north-westerly direction, and finally they came to the zone or a formation which for brevity we will call either the pay streak or the golden zone. They knew that this golden zone or this pay streak was in that proximity and they hit it.

Now, we have the exhibit here, which shows you much better than I can say it, what these men were up against. There was the shaft (indicating),

and there was a point, but this drift had been drilled or had been driven, also out to here (indicating). So when you take this sketch, which is given to you for the purpose of illustration, these broken lines as explained at the time that Mr. Zukoev testified, are drifts which were not used and which these plaintiffs had nothing to do with, and even down here (indicating), about 70 feet, but there, from there on (indicating) this drift was driven to a point here (indicating). Then they came this way at the behest of Mr. Stepovich, but found nothing, and they came back and drove across here (indicating) and there is where they hit what we will call the golden zone.

There were other interferences in the prosecution of this work. Mr. Stepovich tried to cause them to cease the work [370] because he said that they had gone beyond the exterior boundaries of the claim.

Mr. Cole: Your Honor, I am going to object to Mr. Taylor's continually making statements of evidence which there is no evidence in the record to sustain.

The Court: The jury, of course, will disregard any statement of counsel unless it is borne out by the evidence.

Mr. Taylor: And that they had gone beyond the exterior limits and so he had a surveyor come down there, and this surveyor surveyed it and found they were within the boundaries of the claim.

Now, I am going to revert back to the beginning a little bit. Now there were these three partners.

In this book you will find that very nearly from the first of this operation that these partners had hired men, all the time from the date that they went out there to the date that they quit, they had from two to five men employed. And you can take from a computation of these two exhibits and see what those men were paid, how the distribution was, the taxes, the time, and the overtime, and how much was actually paid to these men as compensation.

Now, you will find that during this operation from February 22nd until the 22nd of August, as I said, they worked, from two to five men working for these partners. It will also show that the partners also changed. There was a change in partners. [371]

This partnership actually lasted, that is, the operation lasted 182 days. These books will show that some of these men did work that long. We will also show that Mr. Kupoff and Mr. Zukoev both worked the entire time. We will also show that according to a relinquishment of his interest in the property, that Mr. Drazenovich worked 160 days. We will show that Mr. Kitoff took an interest in the partnership and was there, I believe, 46 days, and Mr. Kabak was a partner for 44 days.

There was an agreement that the partners would receive ten dollars per day for their work. Also the testimony of Mr. Kupoff shows that from the 22nd day of February to the 22nd day of August, 1942, not one day was lost; that they worked ten hours each day of that period, no holidays, no

Sundays, and the time book will carry that out.

Now, ten hours doesn't seem like a long time, but when you go for 182 days, as Mr. Kupoff and Mr. Zukoev did, they are not working out in the sunshine. They are not working out where there is air and light. They are down in the bowels of the earth, in the dark, in the dampness, digging into the face of the frozen muck, with the wavering light of a miner's lamp, and that is day after day, and day after day, driving forward, in the expectancy of reaching this golden zone, and they did reach it. And you have heard the testimony of these witnesses as they advanced day by day, cleaning out these drifts that had been there, and when they got in further, of driving on through [372] a little bit at a time, dragging their hoses behind them, driving the points into the frozen ground, then removing it, laboriously shoveling it into the mine cars and pushing the mine cars out to the shaft, hoisting it up and dumping it.

That is work, hard work, and in addition to that they had these men who are shown on this book here (indicating), they likewise were working day after day and day after day, ten hours a day. You can see the days that they worked, the distribution of the regular time and the distribution of the overtime, and the hours that they did work.

There were a lot of other things in that, too. There were matters of the food, and they purchased that. They had a cook out there part of the time. Part of the time they did their own cooking. And they were spurred on by the fact that they ex-



pected that that time and effort was going to be productive of results, good results, and we have here an exhibit that showed the money they paid out. They stated there were more checks than they show by the check stubs. So you can check those and see that as they went along they were paying upon their bills.

Now, also, you heard the testimony of Mr. Zukoev and Mr. Kupoff, testimony as they were going ahead they were constantly panning, panning, panning. Panning is the result of practically every discovery of gold in Alaska, and those men get very good at panning, and with all your mechanical devices of drilling and all of that, what does it finally boil down to? [373] You heard the expert here on the stand yesterday. They have their rotary drills and they go down and down and down. They take out a core. They go on down. How did they arrive at what the values are down there? Just as Mr. Colp says, "We panned what we got out of that hole." The pan, actually, tells you everything. No matter what drills you have, it is the little old gold pan, you get it down there in the water and you agitate it and gyrate it and get a little line of gold out in the edge.

So there are your experts. They come down to the pan. They are the ones that used the pan as being the final result, to find out how much gold there was. So the pan is what counts, and these men get very good at it. They can tell to a few cents or a few dollars.

Now, we are back down in the golden zone, and

what have we got? We have got pans of fifty cents, seventy-five cents, a dollar, a dollar and a half. Wonderful, wonderful ground. And those figures were not based upon taking a shovelful of dirt from down at the bottom of the bedrock where the heaviest concentration of gold, but they went up to a point six feet high and chipped out of that frozen muck the gravel clear on down. They caught that in the pan, and then they rotated it and gyrated it, took out the rocks and the dirt and stuff, and finally when they got down to the black sand, finally they whirled that out, and they got their gold in there. And they can tell by looking at it how much. You can't fool them. [374]

Now, here these boys, they panned that. They felt that "we have hit it."

As Mr. Zukoev testified, they drove across here (indicating), and about where that line is is where they hit the pay streak (indicating). To ascertain as to the extent of that body of high-grade gravel, they then drifted up this way and they drifted down this way thirty feet in each direction. So then they had a face on this pay streak 60 feet wide and they panned all along that 60 feet, and it was uniform. It was fifty and seventy-five and a dollar and a dollar and a quarter and a dollar and a half a pan. They knew then they had struck it. So then they then bring their steam pipes in. They bring their hoist, their hoses, and their points in, and then they started to drive. They drive these holes in and then they put these steam lines in there and let them stay for ten hours. I think Mr. Zukoev said he was

the head of the underground operations, and in time that would thaw out to a depth of 12 feet. So then when that was thawed, they withdrew those points, and then they started again the laborious work of shoveling this thawed ground and gravel with its gold content into the mine car, down through the dark and out into the shaft and up above where they immediately started washing that. They would dump that in the hopper and wash as much as they could of that, and then they knew that that was rich dirt, and in the evenings they would work and also [375] wash more.

There is no dispute as to those matters. So now let us see what was in that area. They tested. They took out a 60-foot width, or length here, 12 feet deep, and that they removed all that and took that out, and they took it out six feet high. It only takes a little calculation to do that. Here is six times sixty times twelve, that is 4,320 cubic feet. That is 170 yards.

Now, the testimony here is that—let's take the lowest figure, the lowest pan. You are at liberty to say that that averaged more than that. But let us take fifty cents a pan. There are seven pans to the cubic foot, so if we take the seven pans, that would be, at the lowest panning value, \$3.50 per cubic foot, and 27 cubic feet to the yard would be \$94.50 a yard. Or let's leave it in cubic feet, 4,300, 4,300 and 20 cubic feet, well, multiply that by \$3.50, and what have you got? How much was taken out of that one area? So we take 4,320 cubic feet and multiply that by \$3.50. Let's see what we get. \$15,120

out of that block of material, block of gold-bearing gravels and dirt that was taken out of the six feet by 60 feet by 12 feet deep.

That is not an extravagant mining ground in Alaska. There have been lots of them richer than that. So there is \$15,120 which they took out. [376]

Now, the testimony of Mr. Zukoev, I believe it was, he testified that as they went in further into the golden zone the values got better, and then they put in another line of hose and points and were thawing another 12 feet when they were very rudely interrupted in their operations by the arrival of a Deputy Marshal at the scene of the operation, and they were taken out of there. The mine was on an operating basis and was producing, and this marshal came out there and served upon them a summons, and evidently they served a complaint on them, and the complaint and summons—the summons, and also they served upon them a writ of attachment. The District Court in this case said, this is the case of Mike Stepovich v. James Zukoev, Paul Drazenovich, Nick Kupoff, Mike Kitoff, and Nick Kabak, and this is command of the Marshal:

“That you attach and safely keep all the property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff’s demand, as above stated, to be found in your Division of said District \* \* \*.”

The demand says:

“Whereas, Mike Stepovich, plaintiff, hath complained that defendants are justly indebted to plaintiff to the amount of Three Thousand Fifty-one



Dollars and nine cents and the necessary affidavit and undertaking herein having [377] been filed as required by law.”

Also a summons for them to appear in court and answer his complaint that was based upon his first cause of action for \$2,700 plus interest thereon at eight percent from April 15, 1942, and also there were four other causes of action in there.

The reason I call your attention to this caterpillar tractor that was mentioned in the lease, I would like to call your attention to this complaint. This is the complaint of Mike Stepovich against these defendants. He said, “That at their special interest and request,” “they” being the plaintiffs in this case, “plaintiff rented to defendants one RD-7 Caterpillar with bulldozer attachments and sleighs from the 20th day of February, 1942, to the 15th day of April, 1942, a total of 54 days, at an agreed rental of \$50.00 per day, making a total of \$2,700.00.”

Maybe you remember Mr. Kupoff’s testimony here, that that caterpillar was there, is was used at one time to do some work for Mr. Stepovich, and also he did a little bit of work for himself, a couple of days, but that was with Mr. Stepovich’s permission. But a few days later Mr. Stepovich leased that caterpillar tractor to the Cleary Hills Mining Company, and it wasn’t on the ground any other time that these people were there. But he goes ahead and on oath swore that he had rented this caterpillar to these defendants. [378]

He also in here says he wants \$2,700 for a cater-

pillar that was being operated by the Cleary Hill Mining Company, a company operating a long ways from there.

Now he also says that these boys were indebted to Shermer and Lawrence Reed, co-partners doing business as the Pioneer Express, in the sum of \$133.50. He said the indebtedness had been assigned to them. No assignment was shown here.

And then he finds out that these boys owed Independent Lumber Company. That was Ferguson and Rutherford, \$18.60. He finds that out and he puts that in. And also there is Mr. Barrack, who was the owner of the Samson Hardware. He finds out they owe him \$11. You will see, if you leaf through these, you will see checks made out to Mr. Barrack, you will see checks made out to the Sourdough Express, you will see checks made out to the N. C. Company, and then mentioning the N. C. Company, brings to my mind that the last count of the complaint states that he was indebted to the N. C. Company in the sum of \$187.99, and that they had assigned the debt to him, but isn't it odd that they would assign the debt to him? Why did Mr. Kupoff for over a year after they ceased operations out there receive bills monthly from the N. C. Company for \$187.99?

That was nothing but a pack of lies, the whole thing. It was a malicious thing. It was an unlawful abuse of the processes [379] of this Court. The Court is supposed to protect us in our every-day lives, and it was used as a means of oppression. It was a dastardly thing to do to these men. This thing was on the 21st day of August, 1942.

Now, there is another thing that happened. Now here we will prove this was a deliberate fraud, a fraud upon the courts, a fraud upon humanity, because here on the 8th day of August, thirteen days before the complaint was filed, there had been a full settlement of the account between these men who were working in the mine and Mr. Stepovich, and it reads as follows:

“To: North Star Mining Company, Dr.

Fairbanks, Alaska

to Mike Stepovich, Cr.

“Back royalty due on all cleanups prior to Aug. 2, 1942.....	\$ 145.92
Wood—3 cords @ \$10.00: 8 cords @ \$6.00; and 6 cords @ \$5.50.....	111.00
Caterpillar rent under lease * July payment .....	250.00
Groceries as per inventory.....	43.03
Royalties on August 2, 1942, cleanup —based on \$27.00 per ounce — 48 ounces (331⅓% of \$1296.00).....	432.00
Caterpillar parts .....	45.65
Waechter Brothers Company bill paid by Mike Stepovich.....	138.34
A total of [380].....	1,165.94.

“August 8, 1942—Paid in full, as follows:

Cash .....	\$1,120.29
Offset by services rendered moving light plant and supplies to home...	45.65

and that making a balance due to Mr.

Stepovich of ..... \$1,165.94,

which was paid and signed by Mike Stepovich, himself, thirteen days before he filed this suit and went in and took these fellows' belongings. All they had was the clothes on their backs and their blankets.

He went further than the law allowed, and took the food. Didn't leave them a bite of food. They took their oil and their fuel. They couldn't burn a stick of the wood they had there.

Now, is that the humanity that one person should show to another?

Now, I think we can conclude from this that this was a deliberate attempt, an illegal, unwarranted attempt, for Mike Stepovich, who had been in the drift up there panning and panning and panning, and it was only when he found out that they had hit the golden zone did he do this, and he did it for the purpose of depriving them of the fruits of their toil, that he would get that gold. He would get it. He would drive them out of there. Five and a half months of slavery for Mike Stepovich, because they worked for nothing. You can take that into consideration in arriving at your verdict. [381]

Now, they waited and they waited and they postponed this trial, and finally the attorneys for the North Star Mining Company, for Mr. Kupoff and Mr. Zukoev, wanted to get it up for trial so that they could go back into the mine, so that they could show that this was a fraud upon the world and a fraud upon the court, maliciously instituted and maliciously carried out. And in here Mr. Collins, who was the attorney for Mr. Stepovich, moved for a continuance of the trial. Mr. Hurley resisted the



motion. This is Plaintiffs' Exhibit O. And the court then denied the motion for a continuance. They couldn't postpone it any more. They had to bring it for trial. Did they have the intestinal fortitude then to go into court and commit perjury? They certainly did not, because right then and there, at that moment, Mr. Collins got up and moved for a voluntary non-suit. They dismissed their own case because they knew it was a bogus case. And you can take that into consideration, too.

Now, you can look these checks over. You will see those checks payable to the Sourdough Express, to the N. C. Company, and everybody else. You can total them up if you want to.

Now, I have here one document I think — now, this is quite an important document in this case, and this is Plaintiffs' Exhibit Q. It is the original of the writ of attachment that was issued to the Marshal to go out and take all their belongings. [382] Now, there is a legal limitation to what can be taken but in this case it far exceeded the legal limits, because the Marshal made this return to that writ, and this was in the District Court for the Territory of Alaska:

Mike Stepovich, plaintiff, versus James Zukoev, Paul Drazenovich, Nick Kupoff, and the rest of them, doing business under the firm name and style of North Star Mining Company.

“Marshal's Return on Attachment.

“I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Division, successor

in office to J. A. McDonald, Former United States Marshal, do hereby certify that I received the hereto attached Original Writ of Attachment, at Fairbanks, Alaska, on the 21st day of August, 1942, and that thereafter on the 22nd day of August, 1942, I duly executed the said Writ at Fish Creek, Alaska, by taking into my possession the following described personal property, to wit:

“The dump and contents of the sluice boxes; merchandise and groceries in mess house; gasoline, grease and fuel oil, cord wood and timbers, used in connection with such mining operations, and (this is important)

upon order of the plaintiff's attorney, E. B. [383] Collins, instructed the miners engaged in said mining operations to leave the premises, and by authority of the plaintiff, permission was given to use the cat and battery charger to remove their personal belongings from the premises, and to return the cat to where it was when they were through with it. At which time and place, I appointed Emil S. Ryland as custodian, at the rate of \$8.00 per day.

“No physical inventory was taken of said personal property appears from the records in this office. The writ is herewith returned. That thereafter on the 15th day of September, 1942, upon written request of the plaintiff, the custodian was released as of September 14, 1942.

(signed) Stanley J. Nichols,

U. S. Marshal,

By: John J. Buckley,

Chief Deputy Marshal.”

Mr. Stepovich and his attorney stripped them down to their blankets, and just to be sure that they would not return we will call your attention to Plaintiffs' Exhibit R, of which there are four parts.

“Public Notice of Attachment  
“Office of the Marshal of the United States  
4th Division, District of Alaska [384]

“August 22, 1942

“This cord wood and timbers having been attached by me and now being in my possession by virtue of a Writ of Attachment \* \* \* Notice is hereby given that any person removing or attempting to remove said cord wood or timber without my written permission, or in any way interfering with said cord wood and timbers or my duly authorized Deputy or Keeper in charge thereof, will be prosecuted to the extent of the law.”

They were going to fall back and have the law protect them, in keeping these men out.

The next and the formal parts of it are the same as the other, but this was directed to the gasoline, fuel oil, and grease, and that likewise was attached. And the next one, the merchandise and groceries in this mess house. They took their groceries in the mess house. And the next one, the dump and the contents of the sluice boxes.

Now, it wasn't until November 24th that that matter was released, and what had happened between August 22nd and November 24th? Winter had set in. That shaft had filled up with water. The

drifts had filled up with water. They had frozen.

Maybe Counsel will say, well, they didn't go back to the place. How could they go back to the place? Their food had been taken, never returned to them. The tools had been taken, [385] never had been returned to them. The stuff down in the shaft and in the mine was down there under water, had flooded, and had frozen in, and if they went back onto the property then it would have taken them just the length of time to get up to the pay streak again as it took to get down there in the first instance, which was better than five months—about five and a half months. Because it was not until after the first of August of 1942, in fact, it was around the 8th of August, 1942, that they got into the paystreak, into the golden zone, into that part of the mine which was the culmination of all those five and one-half months of work. They were working down in the drifts, in the dark, with a little miner's light ten hours a day, and then in the evening they put the gravel through the sluice box.

Now, I have a little sketch. It is a perspective sketch, looking down on what is going on inside of such a mine. You heard the testimony over here that it is 93 feet down to the floor of that shaft, and this, as we say, we disregard that drift, we disregard that, because they were there and there was nothing in there (indicating). So they came around about here (indicating), and they drove this in here, and they drove over to here (indicating), but this is wrong, because Mr. Zukoev said they came back and drove over here (indicating), but if we



transpose this over here (indicating) it will be the same thing. [386]

And that, ladies and gentlemen, is where they took out that block of gold-bearing material in there, six feet deep, sixty feet long, and twelve feet wide, and had put another line of hose for another 12-foot thaw. And out of that, taking the lowest computations on the panning which they had taken would amount to \$15,120. And the pay was getting better. And also you can also, from the testimony that has been given here, say that this was taken out here (indicating). Now, the pans were just as good when they took out that first six by twelve at both ends and at the back of it as it was there. So you can take into consideration that another block of gold-bearing material in there that was thawed, during the process of thawing, would be equally as rich as that which we can conservatively estimate to be \$15,200. In fact, you can take more than that if you want to, because that was the minimum, because the pans were 75 cents and a dollar, and so forth. That is good dirt. That is the rainbow, if you can say that a rainbow, that you crawl along these drifts for 5½ months. It might be that it would look like a rainbow when you see it.

It actually turned out that these men were slaves for Mike Stepovich from the 22nd day of February to the 22nd day of August, 1942, but what did they get? What did they get out of it?

They got nothing.

You can also, ladies and gentlemen of the jury, from the [387] testimony of the experts, you can

conclude that, as one of the experts said, I forget whether it was Mr. Mathews or Mr. Colp, that with a showing like that, that there would be a zone of influence, and he drew a big circle up there, that there was a reasonable expectation that that pay would permeate that zone of influence, because it is a certainty that there would not be a line like that and another sharp line that way and another one that way, and they say, "This is all." Because it wouldn't be. You would know that it is just reasonable to believe from that testimony and from the fact of the size that was taken out, and there was no change in the values, that you can estimate that that pay streak was continuing.

We know we had over \$30,000 in this gold-bearing material right there, thawed, but some of it had not been taken out. Why did Mike Stepovich want to get these men away from there? Because he wanted to wash that gravel through the sluice boxes. He was the one that wanted to take advantage of all the thousands of dollars that these men had spent in supplies and in wages and in work, in virtual slavery, ten hours a day, seven days a week, thirty-one days a month, and those men had no Fourth of July, no Sunday, no holiday, and then Mr. Stepovich invokes the power and majesty of our law, by perjury and fraud and malice, to wrest from these men that to which they were lawfully entitled, and he made them walk away from there, folks, with just their blankets. [388]

I don't know what Mr. Cole is going to say. Perhaps he will tell you that poor Mike Stepovich was

certainly set upon by these men; that they were just robbing him.

Now, Mrs. Stepovich testified up here that Mike said one time that he was suspicious that somebody was taking gold out of the sluice boxes. Who is the person that is usually suspicious of other people being a thief? It's a thief that is always suspicious of somebody else. I think you can bear that in mind.

You can bring in a verdict, ladies and gentlemen of this jury, of between \$30,000 and \$50,000 or \$100,000, but if you bring in a verdict for \$100,000 you are not nearly repaying these men for the indignities and the suffering that has been inflicted upon them and which they have been trying to collect for fifteen years.

They believe in their cause being right, and that is why they are here. They are just working men. We hope that you will take those matters into consideration when you retire to the jury room and bring in your verdict.

The Court: Members of the jury, please heed the admonition I have given to you so many times, and we will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes. [389]

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do you folks wish the roll call of the jury?

Mr. Taylor: We will stipulate the jurors are all present, Your Honor, including the alternate.

Mr. Cole: We will waive the polling of the jury, Your Honor.

The Court: Very well, you may proceed.

(Thereupon Mr. Cole presented argument to the jury on behalf of the defendant.)

Mr. Taylor: Would the Court like to take the recess before I proceed?

The Court: Would you prefer it, Mr. Taylor?

Mr. Taylor: Yes.

The Court: Very well. Members of the jury, please heed the admonition I have previously given to you. We will take a ten-minute recess.

Clerk of Court: Court is at recess for ten minutes.

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Do the parties waive the roll call of the jury?

Mr. Cole: Yes, Your Honor.

Mr. Taylor: Yes, Your Honor.

The Court: Very well. Do you suppose, Mr. Taylor, you can limit your rebuttal to half an hour?

Mr. Taylor: Yes, Your Honor. I am going to touch briefly only upon some of the remarks of Mr. Cole.

First, if the Court please, Mr. Cole, and ladies and gentlemen of the jury: I want to congratulate Mr. Cole upon his masterly misinterpretation of the evidence. It was a good job so far as it went. Mr. Cole is doing what he was supposed to do, to take this evidence of the plaintiffs and try to put it in the worst possible light. He has got to play Mr.



Stepovich up as a great benefactor of humanity, a man who was looking out for the welfare of his fellowman, and he has done a fairly good job. And with tears in his voice he has called your attention to this poor lady who has had this lawsuit hanging over her for fifteen years, but what about these poor men, working men? They have had it hanging over them for fifteen years. They were the men who were virtually slaves to Mike Stepovich for possibly six months. They were the ones who were cooped up in the underground workings of the mine and received nothing for it.

Now, they said there was nothing in the sluice boxes nor there was nothing in the dump, but I read one of the exhibits here, an attachment notice, placed on the gin pole. They attached the dump and the contents of the sluice boxes. There was no value there, though, but they sure attached it.

Now, another evidence of the value of the mine is the fact that the F. E. Company, the United States Smelting, Refining and [391] Mining Company, which I don't believe ever out of sympathy buy a mine or buy any property, has the Eastern Star Mine under a 50-year lease, and Mrs. Stepovich is the beneficiary of that lease. Mrs. Stepovich is living off of some of the earnings that came from Mr. Kupoff and Mr. Zukoev and their fellow partners.

I think one of the greatest arguments as to the value of that mine is that the F. E. Company in 1942, in the fall of 1942, while these plaintiffs still had the lease on it, the lease hadn't been canceled,

leased that to the United States Smelting and Refining Company for fifty years. You have never seen that company buy a pig in a poke. When they took that claim on a 50-year lease, you can bet that there was surely something in it.

Now, I made some strong statements, yes, I did. I will admit to Mr. Cole that I made them, but they were called for. Any man that would do the despicable things that Mike Stepovich did to these men deserves strong statements.

I am surprised that Mr. Cole threw out his heart on this thing. These men were mining. How were they mining? When they went there, what did they find? A shaft 93 feet deep, and they were cleaning that out, which took a month. Was that mining? When they were cleaning out the old drifts was that mining? And when they were going through that part of the underground workings where there was very little gold, if any, that wasn't mining. That was development work, and [392] the mere fact that they were spending money doesn't mean they were operating at a loss. They did, incidentally, put some of that dirt through the sluice box after they got in there, but you want to remember for about four months everything that they hoisted out of that mine was piled in these dumps that Mr. Colp and Mr. Mathews sampled. It was waste material, because they never sluiced until June, and they were hoisting out of there and dumping. That was the only place they could dump it. They couldn't haul it away. They dumped it on each side of there.

When they got to the rich area, what did they do then? They concentrated on washing that, because they knew that that was rich dirt. So that went through, and it left the dump which consisted only of that stuff which had been taken out on their development work. They did get some money out of that. Some of it they got \$3,500. That was incidental to the development, and you couldn't call that engaging in mining, as much as you could say that if somebody was building a factory and every day they spent a lot of money but nothing coming in, that the company was losing money because they were building a factory or a building. It was developing, and just what these people were doing.

Now here (indicating), you see this dump is about, I would say, five feet high here. Something has been taken out of the [393] center of it. This is from one side. But we also want to show you that there was a dump there in 1941. Mr. Cole doesn't tell you that. That was there in 1941. And this was there in 1957. And another thing, Mr. Mathews says there are two generations of workings there. Where did the second generation come from? We do know that Mr. Zukoev, who was running the hoist, he did dump what was brought up during the development work for three or four months, he had to pile it some place, and he piled it there, and Mr. Cole sent Mr. Mathews out to get samples of that dirt. They could expect they would get very little, if any, values out there. But Mr. Kupoff said when they got into the rich dirt they were feeding that into

the hopper and into the sluice boxes, because they said they wanted to get as much money out of that particular thing as early as they possibly could.

Now, another thing, Mr. Cole made something out of what Mrs. Stepovich said. She said Mike said he thought somebody was stealing gold. Didn't say who. I asked her who she thought it was, and she didn't know.

As I said before, the suspicious person is the person that usually is the thief, but Mr. Stepovich was present at every clean-up, and he is the man that took clean-up into town and put them in the bank, and one of them he didn't bring to the bank either. They had to get a lawyer to get that [394] \$1200 clean-up away from him.

Now, Mr. Cole laments the facts that we sued the estate. Fine and dandy for Mike Stepovich to perjure himself and make a complaint against these fellows, but don't sue this estate. It is a terrible thing to sue Mrs. Stepovich. She is down to her last yacht, her last Cadillac. But we know she is not down to her last revenue in producing buildings.

One time Mike Stepovich says they owed him some royalty. They did. They billed these boys for royalty. They were paid on the 8th day of August, 1942. Everything was settled between Mike Stepovich and these partners. But immediately after that, when they strike this rich pay, that is when Mike Stepovich said, "They are not going to get that. I am going to have it." And that is when he started this, because was on the 21st day of August.



Now, who stands to gain the most by winning this lawsuit? Mr. Stepovich, or not Mr. Stepovich, but Mr. Kupoff and Mr. Zukoev, they will gain something, but Mrs. Stepovich, if she wins, she is the big winner. She is the big winner. I think that she was truthful. I don't think she told an untruth in there. She told you that her husband said that he thought somebody was stealing gold, but he didn't say these men, and he had several outfits on the property.

Now, Mr. Cole has stressed the fact about these expenses [395] and about the losses they had. Now, some of this expense can be directly attributable to Mr. Stepovich at the time he had them turn to the right to keep them from going towards this pay streak, and they went over there forty-some feet, drifting, and went over there and found nothing, came back, and then went the other way.

Now, I wanted to call your attention to something. I was going to put on here that we had an area, a block of gold-bearing dirt, which was six feet deep by 12 feet in depth by 60 feet in length. That equals 4,320 cubic feet. Now, then, we had seven pans to one cubic foot, at fifty cents, which was the lowest pan, that would be \$3.50 per cubic foot, or \$94.50 per cubic yard, and that would be, then, \$15,120 in that particular area that they took out. If they had been allowed to take out the other thaw they got, they would have had twice that much, or \$30,240. That is proven value. It is proven by the same way that the mining engineers say they prove things, by the pan, because they came in

here, three of them came in here and told us they panned. That is what these experienced miners did. They panned and they got that.

Now, that would be that much if you only take fifty cents a pan, but if you take seventy-five cents a pan it would be fifty percent more. So then if we took the two thaws, if you allowed them the two thaws, you would have this amount for [396] the two thaws at fifty cents, and you can work it on up, and you can take into consideration whether or not this went that much.

If it was 75 cents, it would be \$46,060, and if it was one dollar a pan—I will put 75 cents here—one dollar a pan, would be \$60,480. That would be a conservative estimate of what that would be, and double if you allow for both thaws, and that is what we feel that you should bring in a verdict for.

Another thing, as I stated before, you can take into consideration, that after that mass unit of sixty foot by six foot by twelve foot was taken out, that the ground adjacent to where is was taken out showed better values than what was taken, so you have the right to conclude that that value continued, not only into the pay streak, but at both ends, or as the mining engineer said, there would be an area of influence in which you could expect to get gold of approximately the same richness as that.

Now, as far as Paul Drazenovich is concerned, Mr. Cole would have you believe that Mr. Drazenovich sold out after they hit the pay streak, but you remember Paul Drazenovich sold out before they had the reckoning and the man paid him the

eleven hundred and some dollars and they hadn't hit the pay streak, then. Paul Drazenovich, if he were here, he might tell you another story. He might tell you a story of threats and a gun [397] and things that way, but I don't know where Paul Drazenovich is.

And if Jimmy Zukoev was here right now, he could tell you that he is sick and he went to the doctor yesterday at the conclusion when he got through here. Jimmy is not indifferent to this, but Jimmy was a sick man when he was here all the time.

Also, I think I mentioned this to you, that although the engineers tell you that all these values were arrived at by drilling, how they could tell the extent of the mass of this pay, but after all they finally decided, Mr. Colp did, to pan what comes up from the drill, and I have no doubt but what Mr. Zukoev or Mr. Kupoff are possibly two as good panners as there are in the Territory of Alaska. I know that they are as good as these mining engineers, because they don't do a great deal of panning. But that is their life.

Now, you have a right, from the evidence here, you can project into the future and from the values there you can make an estimate of what the boys would have taken out if they had been allowed to operate there, from the 22nd day of August until November the first of the following year. They could have worked in the winter. They could have gotten their dump out in the spring, and in the summer they could have run it through.

Now, Mr. Cole would have you believe that the only thing you can go by is what you actually see. But I believe it was [398] Mr. Beistline who said that lots of times the pay streaks will run for miles. We know that. There will be whole creeks for five miles, six miles long, pay from one end to the other, and these deposits underground were put there at one time by a creek, and if you can get the direction of that creek, the way it ran, when it deposited the gold there. that pay streak could run for many, many hundreds of yards.

He said they run for miles, and possibly we in our knowledge of conditions up here know of places where they run for miles.

You don't have to guess on this matter. You know what happened. You know that the boys were deprived of the fruits of their effort over a period of five or six months. Profit and loss—you can't figure a cost for those things that are not mined but which were there that could have been taken out, so you can place whatever value you want upon that gold, that gold-bearing material that was in that mine which they could have gotten out, as what you should bring in your verdict for, because you can't use as a yardstick that money that they expended, because that was all for dead work.

Incidentally, though, they did take in \$3,500, so you don't have to guess about that.

Of course, the big, strong point that Mr. Cole made is the fact that Mr. Colp and Mr. Mathews did pan the old dump that was taken out when they were cleaning up the tunnels and when they were



taking out through the lean part of the workings until [399] they got to the high grade, until they got to where, to what we call the golden zone, and from that time on they worked and they dumped into the hopper and ran that dirt through, because they knew that the values were there. Very little, if any, of that dirt, except maybe down near the sluice boxes, there might be a little bit of it, but I think this dump is more or less the same as it was, according to Mrs. Stepovich's picture, that was introduced as the appearance in 1941. An old dump. Both the engineers told you that. It is an old dump.

Why didn't the Stepovichs many years ago go out and pan that dump and see what it was. They wait fifteen years. This suit has been pending for ten years. Why didn't they produce this stuff instead of expecting to have you guess as to things?

You are not to guess about what has been testified to under oath by Mr. Zukoev and Mr. Kupoff, but they want you to guess that what they say about this is true, whereas the high-grade dirt was sent through the sluice box from the time it was discovered sometime a short time after August 8, 1942, and they put that through the sluice boxes until August 22nd, at which time they were stopped, and Mr. Stepovich, as I said before, was particularly anxious to attach the dump and the sluice boxes and the contents.

This case has not been any satisfaction to me. I have been in it a long time. I feel sorry for Mrs. Stepovich. Mike Stepovich, Junior, is a friend of mine. We have been friends for [400] a good many

years. It is those things that we have to do. I have tried to do the best I can for my clients. My clients have a justifiable cause. They were certainly to mildly put it, they were certainly put upon by Mr. Stepovich, and he took the efforts of ten hours a day for a period of six months of from five to nine men and then wiped out the fruits of their efforts with the signing of his name to a complaint which he didn't have the nerve to back up in Court, but when the property was put in such a state that they couldn't go back on and mine, then when the Court would not give a continuance of the case he took a voluntary non-suit, knowing they could not go back on until the following year.

Now, I hope that when you go out there that one of these figures will be what you bring in. It is a certainty that Mr. Zukoev and Mr. Kupoff who put so much into developing that property for Mr. Stepovich and put it in the shape so that it resulted in the United States Smelting and Refining Company taking the 50-year lease on it. You might say, "Why didn't we get the drillings here? Why did we not show those?" They had the drillings, but they would not bring them in. Why?

Mr. Cole: Your Honor, I object to that. It is clearly improper, and there is no evidence as to that.

The Court: Mr. Taylor, I think I will strike that statement and ask the jury to disregard it.

Mr. Cole: We don't have them. [401]

Mr. Taylor: But Mr. Stepovich called these boys

attention to certain drill holes that they should go for. That is in the evidence. How did he know that those drill holes were there? If he knew they were there, he could have produced the drill logs, but they say we are at fault because we didn't have them.

You have quite a duty, ladies and gentlemen. I do not envy you. A duty to yourself, a duty to the Government, a duty to the plaintiff, and a duty to the defendant. None of us are asking you to do the impossible. We are asking you to use the mature judgment necessary to decide these issues, and I believe that when you have deliberated and considered these matters and these exhibits and the testimony of the witnesses that you will bring in a verdict in favor of the amount that you think the plaintiffs are entitled to.

I thank you for your attention and I think we will feel happy when this matter is concluded.

Thank you.

(Whereupon the Court read the Instructions to the Jury.)

The Court: The Clerk will please qualify the bailiffs.

(Thereupon the bailiffs were qualified and sworn.)

The Court: The jury may retire for deliberations.

(Thereupon, at 5:20 p.m., October 17, 1957, jury, in charge of its sworn bailiffs, retired to enter upon its deliberations, and the alternate juror was excused.) [402]

The Court: Now, Mr. Taylor.

Mr. Taylor: I just wanted to renew our objections to the instructions as given which have heretofore been stated.

The Court: Very good.

(Whereupon Court was recessed at 5:20 p.m., October 17, 1957, and reconvened at 10:40 p.m., the same day, and the following proceedings were had:)

Clerk of Court: Court is reconvened.

The Court: The Clerk will call the roll of the jury.

(Whereupon the Clerk of Court called the roll of the jury.)

Clerk of Court: They are all present, Your Honor.

The Court: Members of the jury, have you reached a verdict?

The Foreman: We have, Your Honor.

The Court: Mr. Putman, you are the foreman. You may either declare the verdict or hand it to the Clerk for declaration.

(Thereupon the verdict was handed to the Clerk, who in turn handed it to the Court.)

The verdict was read by the Court.

The Court: Is this the verdict of each and every one of you?

The Jurors: It is.

The Court: Very well, the verdict will be received. [403]



Certificate

United States of America,  
Territory of Alaska—ss:

I, Esther M. Rasmussen, official court reporter for the aforementioned Court, do hereby certify that the foregoing pages, numbered 1 to 403, inclusive, constitute a full, true and accurate transcript of my original shorthand notes taken at the time of the oral proceedings had in open Court on October 14, 15, 16 and 17, 1957, in Cause No. 5395 Civil.

Dated at Fairbanks, Alaska, this 10th day of March, 1958.

/s/ ESTHER M. RAMUSSEN.

[Endorsed]: Filed March 11, 1958.

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[Endorsed]. No. 15962. United States Court of Appeals for the Ninth Circuit. Vuka Radovich Stepovich, Executrix of the Estate of Mike Stepovich, Appellant, vs. Nick Kupoff, James Zukoev, Mike Kitoff and Nick Kabak, a partnership doing business under the firm name and style of North Star Mining Company, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Judicial Division.

Filed: April 7, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

VUKA RADOVICH STEPOVICH, Executrix of  
the Estate of Mike Stepovich, Deceased,  
Appellant.

vs.

NICK KUPOFF, JAMES ZUKOEV, MIKE KIT-  
OFF and NICK KABAK, a partnership doing  
business as North Star Mining Company,  
Appellees.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT VUKA RADOVICH STEPO-  
VICH WILL RELY

1. The Verdict and Judgment are unsupported by the evidence because the testimony and exhibits offered and admitted into evidence at the trial were insufficient to show that appellees sustained damages in any amount, and further that such testimony and exhibits were insufficient to show that appellees sustained damages in the amount awarded by the jury.

2. The Trial Court erred in refusing to grant appellant's motion for a directed verdict on the ground that appellees failed to prove any loss of profits and failed to present sufficient evidence to entitle the case to go to the jury.

3. The Trial Court erred in refusing to admit as evidence certain ore samples taken by witnesses for appellant.

4. The Trial Court erred in rejecting an instruction to the jury proposed by appellant to the effect that the value of the gold remaining in the sluice boxes in the Eastern Star Mining Claim when plaintiffs left the claim in 1942, if any, was not to be included in any award of damages the jury might make.

5. The Trial Court erred in awarding judgment to appellees for their attorneys' fees.

6. For the foregoing reasons the Trial Court erred in granting judgment in favor of appellees and in refusing to grant judgment in favor of appellant.

Dated: San Francisco, June 10, 1958.

/s/ RICHARD J. ARCHER,

/s/ MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLO-  
WAY, SHUMAN & CLARK,  
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 11, 1958. Paul P.  
O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF  
RECORD TO BE PRINTED

1. Second Amended Complaint and Mining Lease  
which is an Exhibit thereto, Amended Answer and

Reply, being pages 2 through 20 inclusive of the Transcript of Record in cause No. 12367 in the above-entitled court.

2. Transcript of testimony at trial (pages 1 to 404 inclusive of Volume II).

3. Instructions to the Jury (pages 4 to 23 inclusive of Volume I).

4. Defendants' requested Instruction #1 (refused.) (not paginated).

5. Judgment filed March 10, 1958 (pages 1 to 2 inclusive of Volume I).

6. Notice of Appeal filed March 20, 1958 (page 3 of Volume I).

7. Designation by Appellant of Record on Appeal (pages 24 to 25 inclusive of Volume I).

8. Statement of Points on which Appellant Intends to Rely on Appeal (not paginated).

9. This Designation of Portions of Record to be Printed (not paginated).

Dated: San Francisco, June 10, 1958.

/s/ RICHARD J. ARCHER,

/s/ MARSHALL L. SMALL,

MORRISON, FOERSTER, HOLLO-  
WAY, SHUMAN & CLARK,  
Attorneys for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 11, 1958. Paul P. O'Brien, Clerk.